Supreme Court, U.S.
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92-329

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RICHARD A. HEILPRIN,

Petitioner,

v.

WISCONSIN BOARD OF ATTORNEY'S PROFESSIONAL RESPONSIBILITY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

JOHN H. BOWERS*
214 West Mifflin Street
Madison, Wisconsin 53703
(608) 256-9031

MICHAEL RILEY and
ALAN G. B. KIM, JR.**
411 West Main Street
Madison, Wisconsin 53703
(608) 257-4715

*Counsel of Record
**Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. IS THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT VIOLATED WHEN AN ATTORNEY IS DISCIPLINED FOR VIOLATING A PORTION OF HIS "ATTORNEY'S OATH" WHERE THE LANGUAGE OF THAT PORTION IS VAGUE, AMBIGUOUS AND DOES NOT SET FORTH REASONABLE AND ASCERTAINABLE STANDARDS OF PROFESSIONAL CONDUCT?

2. DID THE WISCONSIN SUPREME COURT VIOLATE THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT WHEN THEY REVOKED PETITIONER'S LICENSE TO PRACTICE LAW BASED SOLELY ON GROUNDS WHICH PETITIONER HAD NOT BEEN INFORMED OF AND HAD BEEN GIVEN NO OPPORTUNITY TO DEFEND AGAINST?

PARTIES TO THE PROCEEDING

Attorney Richard A. Heilprin, 905 15th Avenue East, Seattle, Washington, 98112, appeared on his own behalf.

Attorney Michael Riley; Atterbury, Riley, Luebke and Pretto, S.C., 411 West Main Street, Madison, Wisconsin, 53703, appeared on behalf of Mr. Heilprin.

Attorney Kitty Brennan; Murphy & Brennan, 1334 Milwaukee Avenue, Post Office Box 308, South Milwaukee, Wisconsin, 53712-0308, appeared for the Board of Attorney's Professional Responsibility.

Timothy L. Vocke, Referee, Reserve Judge, State of Wisconsin, Post Office Box 1416, Rhinelander, Wisconsin, 54501.

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Disciplinary Proceedings Against Heilprin, Report and Recommendation of Referee, Case No. 90-0503-D, filed April 24, 1992.

STATEMENT OF GROUNDS ON WHICH THE COURT'S JURISDICTION IS INVOKED

The judgment petitioned for review was entered on May 5, 1992. The statutory provision relied upon which confers jurisdiction to review said judgment by writ of certiorari is 28 U.S.C. § 1257 (1988). The constitutional provision involved in the case and relied upon by petitioner is the Due Process Clause of the U.S. Cons. amend. XIV, § 1, "...nor shall any State deprive any person of life, liberty, or property without due process of law..."

STATEMENT OF THE CASE

This petition for review arises from a disciplinary proceeding against Richard A. Heilprin, commenced by the filing of a Complaint and Order to Answer in the Supreme Court of Wisconsin on March 12,

1990. The Complaint and Order to Answer were filed by the Board of Attorneys Professional Responsibility of the State of Wisconsin.

The complaint alleged that Mr. Heilprin, then an attorney licensed to practice law in Wisconsin, had violated WI SCR 20:8.4(g) (then WI SCR 20.04(1)) of the Wisconsin Code of Professional Responsibility by engaging in "offensive personality" contrary to the Attorney's Oath, WI SCR 40.15 (then WI SCR 40.13). (See Appendix.) The alleged violations occurred in separate instances involving a Mrs. Tate and a Mrs. McSherry. Both Tate's and McSherry's complaints were consolidated in the Board's complaint and were respectively enumerated as the First and Second Causes of Action.

Both the Tate and McSherry portions of the complaint were based solely upon the "offensive personality" language found in the Attorney's Oath. That language states that an attorney shall "abstain from all offensive personality." WI SCR 40.15 (then WI SCR 40.13). WI SCR 20:8.4(g) (then WI SCR 20.04(1)) prohibits that conduct by reference, stating that "[i]t is professional misconduct for a lawyer to...(g) violate the attorney's oath."

Both causes alleged that Mr. Heilprin had made inappropriate sexual comments to the women during their individual office conferences with him. The complaint also alleged that Mr. Heilprin had represented a client which allegedly resulted in a conflict of interest in violation of WI SCR 20:1.7(b) (1988) (then WI SCR 20.24(1)) and

WI SCR 20:1.8(j) (1988) (then WI SCR 20.26(1)).

Following the complaint's filing, the Board did not add or seek to add additional violations or charges against Heilprin.

The Honorable Timothy Vocke was appointed Referee and an Answer and a Motion to Dismiss incorporating several affirmative defenses were later filed by Attorney Heilprin. As one of those affirmative defenses, Mr. Heilprin argued that the language proscribing "offensive personality," which formed the basis for two of the three charges against him, was so vague and indefinite as to fail to put him or any other attorney on adequate notice as to what kind of conduct was prohibited. (See Appendix, "Report and Recommendation of Referee.")

A final hearing on the charges was held on March 19, 1991 and continued through March 21, 1991. The Referee issued his report and recommendation on April 24, 1991, ruling that no violation occurred regarding the conflict of interest charge. Regarding the Tate and McSherry portions of the complaint, the Referee found that Mr. Heilprin had made the inappropriate sexual remarks Tate and McSherry alleged and that this conduct constituted "offensive personality" and as a matter of law, violated the Attorney's Oath. The Referee dismissed Mr. Heilprin's constitutional challenge to the sufficiency of "offensive personality" as a standard on which to base discipline as well as his other defenses. The Referee thereafter recommended Mr. Heilprin's license to practice be suspended

for 18 months. (See Appendix, "Report and Recommendation of Referee.")

Mr. Heilprin subsequently appealed from the Referee's report to the Wisconsin Supreme Court asserting again, in part, that the "offensive personality" language of the Attorney's Oath was unconstitutionally vague and did not provide an appropriate basis for discipline. (See Appendix, "Brief of Appellant.") The court adopted the Referee's findings of fact concerning Heilprin's conduct but, contrary to the Referee's conclusion that such conduct violated the Attorney's Oath, summarily concluded that Heilprin's actions instead violated a standard of attorney conduct allegedly set forth in their 1973 decision, Disciplinary Proceedings Against Heilprin, 59 Wis. 2d 312, 207 N.W.2d 878

(1973) and revoked his license to practice on that ground. (See Appendix, State v. Heilprin,") The violation of the alleged standard of conduct set forth in Heilprin, id., was not a basis for any portion of the charges originally brought against Heilprin in the Board's complaint nor had it been raised at any point in the proceedings prior to the court's decision.

The court chose not to address the issue of whether "offensive personality" constituted an appropriate basis on which to revoke an attorneys license to practice. The court felt it unnecessary to address Mr. Heilprin's vagueness argument and instead elected to invoke the standard assertedly set forth in its prior decision involving Attorney Heilprin, although that decision had not been alleged or relied

upon by the Board as a basis for this disciplinary proceeding.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI AS THE WISCONSIN SUPREME COURT HAS DECIDED AN ISSUE IN A WAY THAT CONFLICTS WITH DECISIONS OF THIS COURT

That portion of the 14th Amendment of the United States Constitution which petitioner relies upon prevents a State from "depriv[ing] any person of life, liberty or property without due process of law." U.S. Cons. amend. XIV, § 1. The proscription against "offensive personality" contained in the Wisconsin Attorney's Oath is unconstitutionally vague and ambiguous because it requires that men of common intelligence guess at its meaning and affords no reasonable standard for

agreement as to its application.

Petitioner moreover asserts that his Due Process rights were unconstitutionally impaired when the Wisconsin Supreme Court disciplined him based on an alleged standard of conduct which was neither contemplated nor addressed by the Board, the Referee or Mr. Heilprin. The Board's complaint involving Tate and McSherry alleged only that Heilprin violated the Attorney's Oath by engaging in "offensive conduct." It was this issue which was contested by the parties and decided by the Referee. It was this issue which afforded the only grounds for the court's consideration in reviewing the Referee's findings of fact, conclusions of law and disciplinary recommendation. Petitioner asserts that the court's ex post facto decision to discipline Heilprin based on

grounds other than those he had been apprised of and had an opportunity to defend against, violated the Due Process Clause of the 14th Amendment and is contrary to the prior decisions of this Court.

II. THE DEPRIVATION OF ADEQUATE NOTICE AND AN OPPORTUNITY TO DEFEND IS A DENIAL OF DUE PROCESS

> "The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S. 1, 16, 68 S.Ct. 836 (1948).

A. The Attorney's Oath Proscribing "Offensive Personality" is Unconstitutionally Vague, in That it Fails to Set Forth Reasonable and Ascertainable Standards of Professional Conduct

Though the lower court did not address this issue, petitioner asserts that the

constitutionality of the "offensive personality" language of the Oath was the proper issue on appeal and hence is discussed here.

The Wisconsin Attorney's Oath reads in part that, "I will abstain from all offensive personality." Such conduct is incorporated by reference under WI SCR 20:8.4(g) (then WI SCR 20.04(1)) which states that "[a] lawyer shall not violate a disciplinary rule or the attorney's oath." Imposition of discipline based solely on "offensive personality" does not comport with the language or the spirit of the decisions of this Court. The Board seized upon that language to impose discipline based upon the broadest possible language in the Oath and which finds no equivalent in SCR 20, which sets forth the Rules of Professional Conduct for

Attorneys. The Court's ruling in this case will determine whether not only Mr. Heilprin, but any attorney can be subjected to discipline solely for violating the broad aspirational language of a professional oath which provides no further guidance as to its intention or reach.

The particular language relied upon by the Board is couched in terms that are more appropriate for setting goals than setting standards. While portions of the Oath may fairly be viewed as setting forth minimal standards, that can scarcely be said of the reference to "offensive personality." The ambiguity of this standard effectively deprives attorneys of notice of what constitutes "offensive personality" despite the fact that this lack of notice does not immunize them from punishment should they be unfortunate enough to act in what a

particular court may deem "offensive." Adequate notice of what conduct is prohibited is "a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law." Connally v. General Const. Co., 269 U.S. 385, 391 (1925). A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. Id.

If lawyers are to be judged and found wanting based upon offensive personality, what limits are to be set upon that judgment? Is the use of strong, if not sexually explicit language to be a fit subject for discipline? Will the recounting of jokes which do not meet the

current standards of good taste or restraint subject the teller to suspension? Many of us exhibit personal foibles that may be offensive to others, and most have taken offense at the speech or conduct of other lawyers on more than one occasion. In each instance where offense is given or taken, are we placed in peril of discipline? The language of the Oath provides no guidance on any of these issues and such an amorphous standard should not be used to so broadly proscribe and severely punish conduct.

B. Petitioner Was Denied Due Process of Law When the Lower Court Revoked His License to Practice Law Based Solely on Grounds Which He Had Not Been Informed of and Had Been Given No Opportunity to Defend Against.

The lower court denied Mr. Heilprin due process when they imposed discipline based on the violation of a standard not

otherwise raised and defended against in the prior proceedings. In its opinion, the court stated:

> "We adopt the referee's findings of fact concerning Attorney Heilprin's conduct but, contrary to the referee's conclusion of law that such conduct violated the Attorney's Oath, we conclude that it violated that very standard of attorney professional conduct enunciated in 1973 in a case involving this same attorney, Disciplinary Proceedings Against Heilprin, 59 Wis. 2d 312, 207 N.W.2d 878 (1973)." Disciplinary Proceedings Against Heilprin, 168 Wis. 2d 1, 482 N.W. 2d 908 (1992).

The court, perhaps mindful of the shortcomings of "offensive personality" as a standard for discipline, simply abandoned that standard and substituted an undefined standard which had not been cited or relied upon at any point in the proceedings. In doing so, the court deprived Attorney Heilprin of any notice or meaningful

opportunity to defend himself as required by the 14th Amendment. The violation of the undefined standard enunciated in Heilprin, (1973) (See Appendix) was not a ground upon which the Board's complaint was based. There is no evidence that either the Board or the Referee ever asserted that Heilprin's conduct violated that "standard" or that the prosecution of Mr. Heilprin was in any way based upon it. The decision of the court to impose discipline upon Mr. Heilprin based upon a standard which was never asserted in the course of the disciplinary proceedings and which Heilprin was never permitted to address is violative of fundamental due process requirements.

Regarding the requirements of due process, this Court has stated that:

> "For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in

> order that they may enjoy that right they must first be notified...It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" Fuentes v. Shevin, 407 U.S. 67, 80 (1971).

In the case at hand, the alleged violation of the standard of conduct set forth in Heilprin, (1973) for which Mr. Heilprin was here disciplined was disclosed only through the court's decision. Prior to this, Mr. Heilprin had no knowledge and had no reason to believe that the charges against him and the potential for discipline were to be based on the violation of an entirely different standard than that asserted and relied upon by the Board and defended against by Attorney Heilprin. Because Mr. Heilprin had no notice of the charges on which the court chose to base its discipline, Attorney

Heilprin had no meaningful opportunity to defend himself. All of the decisions taken concerning how to conduct his defense were rendered meaningless when the court chose to substitute its own "standard" of conduct after the fact.

Moreover, the standard of conduct relied upon by the court and allegedly set forth in Heilprin, (1973), does not adequately describe conduct which will or will not be punished. In that case, the complaint filed by the Board of State Bar Commissioners sought the discipline of Mr. Heilprin for various occasions when he had created disturbances in a court clerk's office, threatened and accused the personnel therein of dereliction and dishonesty, of making threatening phone calls and sexual misconduct involving clients. The complaint specifically sought

to punish Heilprin for "unprofessional conduct" and he was eventually disciplined on that ground. Heilprin, 59 Wis. 2d at 313.

The Supreme Court of Wisconsin affirmed the Referee's findings that Heilprin had engaged in "unprofessional conduct" and that his license to practice should be suspended until he had recovered from a medical condition which was found to be the cause of his conduct. The opinion fails to specifically describe any standard of conduct that Heilprin violated and which attorneys should be warned against. The court merely writes that "conduct of the type engaged in by Heilprin cannot be condoned." Id. at 322. The court in its present decision made no effort to more specifically define or enunciate the "standard" on which it relies. This

general admonition falls far short of the certainty and clarity required for a prohibitory rule to pass constitutional muster.

In the 1973 case, Heilprin was found to have engaged in acts of harassment, verbal abuse and sexual misconduct. The court stated that conduct of "th[is] type...cannot be condoned." Id. The court did not specify which acts or combination of acts formed the basis for its decision.

The 1973 case actually focused on a defense based on medical incapacity and was clearly not intended to set standards or conduct. The court's attempt to rely on the case as providing such standards is misplaced. The constitution requires fair notice of acts which are prohibited as well as clear standards by which persons will be judged to have engaged in them. The case

relied on, even if timely raised, does not pass muster.

Moreover, the lower court's reliance on Heilprin, (1973) is incorrect. Heilprin involved a disciplinary proceeding based upon allegations of "unprofessional conduct." The proceedings were brought pursuant to sec. 256.28, Wis. Stats (1972), Attorneys; Admission to Practice. (See Appendix.) Interestingly, that section merely outlines the procedures whereby attorneys were licensed and admitted to the Wisconsin Bar and did not list duties or standards of conduct required of those admitted. The section does not list general or specific types of conduct for attorneys to aspire to or to avoid. The section also omits any type of punishment or disciplinary proceedings for violations of the rules of conduct in that day. The

sheer lack of any modicum of rules, requirements, guidelines or punishments within the statute upon which the earlier Heilprin proceedings and standard of conduct were allegedly based, wholly undercuts the reasoning and propriety of the recent Heilprin court's reliance upon it.

Finally, the conduct which Mr. Heilprin's discipline is based in the present case is substantially different than that for which he was disciplined in Heilprin, (1973). There are no allegations here of the pattern of threats and harassment which were relied upon in the earlier proceeding. There was no contention here of specific sexual conduct which would be proscribed under the criminal code. The only allegations in the present case relate to off color and

inappropriate remarks. The factual discrepancies between the two cases further highlight the impropriety of the court's application of the Heilprin (1973) "standard" to the case at hand.

Ultimately, the disciplinary system must stand the test of fundamental fairness. There are ample tools at the system's disposal to accomplish its ends within those bounds. It is incumbent upon the system as part of our broader system of justice to maintain those standards of fundamental fairness upon which all citizens rely for protection. An erosion of those standards in proceedings authored and governed by the arbiters of fairness in our system undermines the very foundation of that system. To permit discipline to be based on vague standards substituted after

the fact would undermine the basic principle of notice and fair play.

III. THE COURT SHOULD PROTECT PETITIONER'S RIGHT TO PROCEDURAL DUE PROCESS AND GRANT THE WRIT OF CERTIORARI

The Referee's report noted that the Supreme Court of Wisconsin has the authority to determine who it deems fit to practice law within the state. Although the court does have the inherent power to discipline their attorneys, that power does not exempt them from the requirements of the Constitution. This Court has specifically mandated that a lawyer charged with misconduct in a disbarment proceeding is entitled to procedural due process, which includes fair notice of the charge. In re Ruffalo, 390 U.S. 544 (1967).

In Ruffalo, an Ohio lawyer was charged with 12 counts of misconduct by the Ohio

Board of Commissioners. At the hearings before the Board, a 13th charge was added stemming from testimony given at those hearings by Ruffalo and one Orlando, whom Ruffalo had at some earlier point employed. The Board eventually found Mr. Ruffalo guilty of seven counts of misconduct, including the later added charge, No. 13. On review, the Ohio Supreme Court affirmed the conviction based solely on Ruffalo's violation of charge No. 13 and one other charge. The Federal District Court, after ordering Ruffalo to show cause why he should not be disbarred, found that there was no misconduct. The Court of Appeals similarly ordered Ruffalo to show cause why he should not be stricken from the roll based on Ohio's disbarment order. Id. at 545.

Relying solely on the Ohio court's record and findings, the appellate court held that only charge No. 13 justified Mr. Ruffalo's disbarment in that court. This Court reversed the appellate court. It held that because Ruffalo had no notice that his employment of Orlando would be considered a disbarment offense until after both he and Orlando had testified, the procedure against Ruffalo was wanting in due process.

In deciding the case, the court at p. 550 stated that:

> "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer, Ex parte Garland, 4 Wall. 333, 380 (1866) (other citations omitted)... [and] [h]e is accordingly entitled to procedural due process, which includes fair notice of the charge. In re Oliver, 333 U.S. 257, 273 (1948)."

The Court held that in this case, Ruffalo had no notice that his employment of Orlando would be considered a disbarment offense until after the Board's complaint was filed and after both he and Orlando had testified at length. Ruffalo, at 551. The Court emphatically stated that:

> "[T]he charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused." Id.

This Court concluded that the absence of fair notice as to the precise nature of the charges against him deprived Ruffalo of procedural due process. Id. at 552.

The denial of procedural due process in the present case is more egregious than in Ruffalo. The charge against Ruffalo which ultimately served as the basis of his appellate disbarment, was brought during the proceeding following Ruffalo's and

Orlando's testimony, Heilprin's alleged violation of the asserted standard set forth in Heilprin, 59 Wis. 2d 312 (1973) was not disclosed as a basis for his discipline until after the Wisconsin Supreme Court had made and filed their decision, giving Heilprin no chance to defend himself against it. The trap which snared Mr. Heilprin was more insidious than that which this Court found unacceptable in Ruffalo, since the grounds for discipline were not disclosed until the reviewing court's decision was released. Mirroring the failings of the Ruffalo appellate court, the Wisconsin court failed to take any additional evidence concerning Heilprin's alleged violation of this new standard and relied entirely on the Referee's findings of fact. Attorney Heilprin has had no opportunity prior to

this time to address these issues or to offer a defense.

The Wisconsin Supreme Court elected to discipline Heilprin based on a standard of conduct which it did not define and which served no part in the disciplinary proceedings. In doing so, the court effectively deprived Mr. Heilprin of the opportunity to defend himself against defined and definable charges which is central to our concept of due process.

CONCLUSION

Petitioner respectfully requests the Court for a Writ of Certiorari to the Wisconsin Supreme Court to review that court's failure to comply with the procedural due process requirements of the 14th Amendment. The scope of the lower court's review of this case should have

been limited to two matters: 1) Whether the proscription against "offensive personality" is unconstitutionally vague and ambiguous and if not, 2) Whether Heilprin violated the Attorney's Oath by engaging in "offensive personality" and whether the degree of discipline based on the violation of that standard alone was appropriate and constitutional.

By avoiding review of the above issues and basing Heilprin's discipline on charges previously unknown to him, the court deprived Mr. Heilprin of notice and any opportunity to defend himself against the charges for which he was disciplined as required by the Constitution.

Respectfully resubmitted this 18 day of August, 1992.

JOHN H. BOWERS
Counsel of Record

MICHAEL RILEY and
ALAN G. B. KIM, JR.
Counsel for Petitioner

92-329

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WISCONSIN BOARD OF ATTORNEY'S PROFESSIONAL RESPONSIBILITY,

Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

JOHN H. BOWERS*
214 West Mifflin Street
Madison, Wisconsin 53703
(608) 256-9031

MICHAEL RILEY and
ALAN G. B. KIM, JR.**
411 West Main Street
Madison, Wisconsin 53703
(608) 257-4715

*Counsel of Record
**Counsel for Petitioner

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IN THE MATTER OF DISCIPLINARY PROCEEDINGS

Against RICHARD A HEILPRIN, Attorney at Law

Case No. 90-0503-D

SUPREME COURT OF WISCONSIN

Decided May 5, 1992

Reported in 168 Wis. 2d 1 and

482 N.W.2d 908

PER CURIAM

For the appellant there were briefs by Michael Riley and Atterbury, Riley, Luebke & Pretto, S.C., Madison.

For the respondent there was a brief by Kitty K. Brennan and Murphy and Brennan, South Milwaukee.

This is an appeal from the report of the referee recommending that the license of Attorney Richard A Heilprin to practice law in Wisconsin be suspended for 18 months as discipline for professional misconduct.

That misconduct consisted of his having directed sexually explicit and suggestive comments and question to two women clients during office conferences. Attorney Heilprin specifically appealed from the referee's conclusion that by doing so he violated that portion of the Attorney's Oath, set forth in SCR 40.15, by which an attorney swears to "abstain from all offensive personality." Attorney Heilprin also appealed from the referee's assessment of the credibility of the two clients who testified at the disciplinary hearing concerning his conduct as well as his own credibility in the disciplinary proceeding.

We adopt the referee's findings of fact concerning Attorney Heilprin's conduct but, contrary to the referee's conclusion of law that such conduct violated the Attorneys Oath, we conclude that it

violated that very standard of attorney professional conduct we enunciated in 1973 in a case involving the same attorney, Disciplinary Proceedings Against Heilprin, 59 Wis. 2d 312, 207 N.W.2d 878. There, the court suspended Attorney Heilprin's license for an indefinite period until he could establish recovery from a personality disorder that arguably resulted in his having talked obscenely, made indecent gestures, indecently exposed himself and made indecent sexual proposals to two women clients.

This is not to say that Attorney Heilprin's conduct in this proceeding did not constitute "offensive personality" proscribed by the Attorney's Oath[1] but it

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[1]SCR 20:8.4 and its predecessor establish a violation of the Attorney's Oath as professional misconduct. In addition, under these rules, it is professional misconduct for a lawyer to "violate a statute, supreme court rule,

renders it unnecessary that we address Attorney Heilprin's arguments that the "offensive personality" language of the Attorney's Oath is unconstitutionally vague or overbroad when applied to an attorney's professional conduct.

By repeating the type of professional misconduct for which his license had previously been suspended and because of the nature of that misconduct, Attorney Heilprin has established his unfitness to continue to be licensed by this court to represent others in the legal system He has again demonstrated his willingness, if not propensity, to place his person prurient interests above the interest of those seeing his counsel in legal matters, which he did on not one but two occasions.

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supreme court order or supreme court decision regulating the conduct of lawyers." SCR 20:8.4(f).

Certainly, the public should not be subjected to such offensive behavior conducted under the authority of a license to practice law.

Accordingly, we do not accept the referee's recommendation of discipline to be imposed for Attorney Heilprin's misconduct. We revoke his license to practice law in this State.

Attorney Heilprin was licensed to practice law in Wisconsin in 1959 and practiced in Madison but has left the state and now resides in Seattle, Washington. He has previously been disciplined three times for professional misconduct. As previously noted in 1973, the court suspended his license to practice law as discipline for the conduct mentioned and for rude, discourteous, offensive and abusive conduct toward clerk of court personnel, an adverse

party and others. In 1981, Attorney Heilprin consented to a private reprimand from the Board of Attorneys Professional Responsibility for "offensive personality" and repeatedly asking a woman divorce client explicit questions about her sexual behavior. In 1984, the court suspended his license for 60 days as discipline for having contacted directly an adverse puny represented by counsel, taking an action on behalf of a client merely to harass an adverse party's counsel and engaging in conduct involving misrepresentation to harass that counsel. Disciplinary Proceedings Against Heilprin, 123 Wis. 2d 394, 367 N.W.2d 217 (1985).

The referee in this proceeding, the Hon. Timothy Vocke, reserve judge, made the following finding of fact. On June 17, 1987, Attorney Heilprin met with a woman in

his office concerning an automobile accident that had occurred and as a result of which she had suffered personal injuries. Much of the initial Interview was recorded by a reporter and after the reporter had left, Attorney Heilprin asked the woman questions of a more personal nature, including whether she adopted certain positions when engaging in intercourse and whether she engaged in a certain type of sexual activity. At a subsequent meeting, Attorney Heilprin asked the client similar questions and made suggestive comments concerning her sexual practices and activity.

At a third meeting which the client attended in the company of her young daughter, Attorney Heilprin answered a telephone call and began making sexual comments over the telephone in the presence

of his client and her daughter, whereupon the two of them left the office until he finished the call. The client then terminated the attorney-client relationship by telephone, followed by a letter in which she stated in part "I have been very uncomfortable in your presence because of your sexual behavior... ."

The referee specifically found that Attorney Heilprin's statements and questions of a sexual nature directed to the client were not relevant to any loss of consortium claim the client may have had as a result of the personal Injuries she incurred in the auto accident. Rather, the referee found, they "simply exhibited an excessive prurient interest on his part.

In a second matter, a woman met with Attorney Heilprin in March, 1988 concerning an accident in which she had suffered

personal injury. During two conferences Attorney Heilprin asked her sexually explicit questions concerning her physical attributes and her sexual practices. Again the referee found that none of Attorney Heilprin's questions and comments constituted a legitimate inquiry into a potential loss of consortium claim m a result of the client's personal injury but simply demonstrated his prurient interest in her private life. Following the second meeting with Attorney Heilprin the client obtained other counsel to represent her.

With respect to a third allegation of professional misconduct in the Board's complaint the referee found that there was no clear and convincing evidence that Attorney Heilprin had engaged in a conflict of interest when a settlement on behalf of a client became involved with a potential

that opposing counsel would file a grievance with the Board. The referee concluded that Attorney Heilprin's conduct in the matter did not violate any of the ethical proscriptions.

In his appeal, in addition to asserting the unconstitutionality of the "offensive personality" language of the Attorney's Oath, Attorney Heilprin argued that the referee erroneously weighed the credibility of the two women clients concerning his sexually oriented questions and comments against the credibility of his own testimony contradicting theirs. We reject that argument. The referee exhaustively discussed his assessment of the credibility of the women's testimony and the credibility of Attorney Heilprin's. The referee also considered Attorney Heilprin's comportment during the lengthy

disciplinary proceeding including what the referee termed numerous "absolutely meritless motions," deliberate disobedience of various orders of the referee, verbal threats of legal action against various participants and failure to cooperate in the timing of hearings and discovery.

We also reject as without merit Attorney Heilprin's argument that, because the Board did not present testimony corroborating the statement of the two former clients, it failed to establish by clear and convincing evidence that he engaged in conduct warranting disciple. Likewise without merit is his contention that the referee's refusal to permit him to present witnesses to testify concerning the credibility of the women and limitation of their cross-examination on matters relating to credibility deprived him of the

opportunity to provide evidence needed to resolve the credibility issue.

We adopt the referee's findings of fact and conclude that Attorney Heilprin's conduct violated the standard of attorney professional conduct enunciated in Disciplinary Proceedings Against Heilprin, 59 Wis. 2d 312, 207 N.W.2d 878 (1973). For the reasons set forth above, we do not accept the referee's recommendation of an 18-month license suspension as discipline for Attorney Heilprin's misconduct. We revoke his license.

The court afforded Attorney Heilprin the opportunity to show cause why his license to practice law in Wisconsin should not be revoked as discipline for his professional misconduct. Nothing in his response has persuaded the court that discipline less than revocation is

warranted. In that response, Attorney Heilprin continued to contend that the offensive personality language of the Attorney's Oath is unconstitutionally vague and that the referee based his findings of misconduct on the testimony of two persons whose credibility the referee had difficulty in assessing.

IT IS ORDERED that the license of Richard A. Heilprin to practice law in Wisconsin be revoked effective the date of this order.

IT IS FURTHER ORDERED that within 60 days of the date of this order Richard A. Heilprin pay to the Board of Attorneys Professional Responsibility the costs of this disciplinary proceeding.

IT IS FURTHER ORDERED that Richard A Heilprin comply with the provisions of SCR 22.26 concerning the duties of a person

whose license to practice law in Wisconsin has been revoked.

ABRAHAMSON, J., did not participate.

STATE OF WISCONSIN IN SUPREME COURT

In the Matter of the Disciplinary Proceedings Against:

REPORT AND RECOMMENDATION OF REFEREE

RICHARD A. HEILPRIN,
Attorney at Law,
Case No. 90-0503 D

Respondent.

This matter was commenced by the filing of a Complaint, an Order to Answer and an Affidavit of Service in the Supreme Court of Wisconsin on 12 March 1990. After several requests for an extension of time to file Responsive Pleadings, an Answer dated 7 May 1990, was then filed by the Respondent.

The undersigned was appointed as Referee, by Order of the Supreme Court on 12 March 1990, pursuant to SCR 21.9 (4) (1988).

Attorney Kitty K. Brennan appears for the Board of Attorney's Professional Responsibility (Board). Attorney Richard A. Heilprin (Heilprin) has largely appeared in his own behalf, although Attorney Michael Riley appeared with him and argued the motions heard at on 30 October 1990 as Well as during various telephone hearings. Additionally, Attorney Riley occasionally was present at the fact finding hearing on the merits held in Madison.

In his Answer, Heilprin admitted that the Board had jurisdiction under Chapter 21 of the Supreme Court Rules and, further, that he was an attorney duly licensed to practice law in the State of wisconsin.

In addition to filing an Answer with 10 Affirmative Defenses, Heilprin filed a Motion to Grant Jury Trial and a Three

Count Motion to Dismiss on 7 May 1990. The Motion to Grant Jury Trial was denied by written order on 8 May 1990. The Motion to Dismiss, incorporated many of Heilprin's Affirmative defenses.

A scheduling conference - not on the record - was held by phone on 22 May 1990, at which time Heilprin tried to again raise his claim that he had a right to a jury trial; he and counsel for the Board were referred to the undersigned's Order of 8 May 1990. Subsequently, Heilprin made a request for substitution and/or recusal against the Referee; an Order denying his Motion for Substitution Recusal was signed on 4 June, 1990, and filed. Various motions, having to do with discovery, were filed and a hearing was held, in Madison, on the record on 13 July, 1990.

A Scheduling Order Was entered on 26 July, 1990, setting a motion hearing for 29 and 30 October, 1990, on Heilprin's Motions to Dismiss, as well as a fact finding hearing on the Board's Complaint commencing 18 March, 1991. Subsequently, the parties agreed that the motion hearing set for October could be based upon the discovery then extant, and that there would be no need for live testimony. As a result, the time for the motion hearing was reduced from two days to part of one day. The Board and Heilprin both filed Briefs on 26 October, 1990, and oral arguments, as to the Respondent's various Motions to Dismiss, were held on Tuesday, 30 October, 1990, in Madison.

Subsequently, the Board and Heilprin were informed by a letter dated 31 October, 1990, that no recommendation as to the

Motions to Dismiss would be drafted and filed until after the final hearing was held.

Heilprin requested that the Supreme Court either order the Referee to decide the motions or render a decision itself Prior to the hearing on the merits, and the Court declined to do so in an order dated 11 December 1990.

A hearing was held at the Dane County Court House beginning on 19 March 1991. The Board appeared by Attorney Brennan and the Respondent appeared in person representing himself. Attorney Riley appeared periodically but played no major part in the Proceedings. The hearing lasted until midday on 21 March. The Board called the following witnesses: Beverly Tate, Ruth McSherry, Judge Kent C. Houck of Richland County, Attorney David Easton, Attorney

John Rothstein and Attorney Jeffrey Kremers. After the Board rested, the Respondent testified in own behalf and called as witnesses the following: David Mann, Joseph Klein, and Attorney David Mandell whose testimony was struck in its entirety on the grounds that the subject matter of the testimony violated a previous order.

MOTIONS TO DISMISS

Heilprin filed three Motions to Dismiss on or about 7 May, 1990. He incorporated into the Motions 10 separate Affirmative Defenses that he had plead contemporaneously.

Heilprin produced evidence relevant to the Motions to Dismiss in the form of:

An affidavit by Attorney Daniel Hildebrand, an affidavit by Attorney Keith Kaap, the deposition testimony of Gerald

Sternberg, part of the Deposition of an Attorney Bolt, and Heilprin's own Affidavit, which incorporated various exhibits. Additionally, there was filed and considered the affidavit of Attorney James Clark, the Chairperson of District 2 Professional Responsibility Committee. Additionally, the Board submitted Briefs dated 1 June, 1990, and 26 October 1990, and Heilprin submitted Briefs dated on or about 7 July, 1990, and 26 October, 1990.

A hearing was held at the State Bar Headquarters on 30 October, 1990, at which time arguments were made in behalf of Heilprin by Attorney Riley, and in behalf of the Board by Attorney Brennan.

As to Counts I and II of the Board's Complaint involving the Tate and McSherry matters, Heilprin has moved to dismiss

based upon alleged constitutional infirmities as to that part of the Attorney's Oath contained in SCR 40.15, which specifically states: "I will abstain from all offensive personality. . .". Heilprin moved to dismiss the Tate and McSherry matters, as well as the Rothstein matter contained in Count III, on the basis of alleged violations by the Board of the rules under which the Board is to operate in conducting an investigation.

Heilprin argues that the term "offensive personality" is too broad a term to put an attorney on notice as to what kind of conduct is prohibited. The undersigned agrees with that part of Mr. Riley's argument that the statements allegedly made by the Respondent, as to Tate and McSherry, must be considered in the context in which they were made. The

undersigned also agrees that the Attorney's Oath is to guide an attorney only in his capacity as an attorney. As to Tate and McSherry, without hearing evidence, there was no way to determine exactly what the context of the alleged statements were; it is clear, however, that the statements were made in the context of an attorney/client relationship.

COUNTS I AND II; TATE AND MCSHERRY

1. Heilprin claims that he is legally deprived of his constitutional right to a trial by a jury. The Supreme Court has ruled in the matter of Complaint Against Seraphim, 97 Wis.2d, 845, 294 N.W.2d, 485 (1980), that a judge, charged with official wrong doing under the rules pertaining to a judge, has no right to a jury trial. By analogy, the Courts ruling in Seraphim is

on point in the present case. It is the Supreme Court of the State of Wisconsin that is the adjudicator in this grievance procedure against Heilprin, not the Board of Professional Responsibility and not the Referee. Heilprin's constitutional rights are not violated by the failure to impanel a fact finding jury. No damages are sought, no criminal PenaltY is requested; Heilprin's status as an attorney is being reviewed. Thus Heilprin has no right to a jury trial made up of laymen.

2. Heilprin argues that his constitutional rights of free speech are impinged upon by subjecting him to sanctions for violating that part of the Attorney's Oath which prescribes "offensive personality." However, the practice of law is a licensed profession in the State of Wisconsin. The Supreme Court of Wisconsin

has the authority to determine who it deems fit to practice law within the State. The practice of law is a privilege and not a right. This particular argument by Heilprin was also considered in the Seraphim case when the Supreme Court indicated, in regards to Seraphim's claim of a lack of equal protection, that: "It is well established that judges, in company with other public servants, must suffer from time to time such limits on those rights as are appropriate to the exercise and given situations of their official duties or functions."(494.) An attorney, no less than a judge, is an officer of the court and, thus, in return for the Privilege of practicing law, he or she may very well have to give up certain rights under the laws and Constitutions of the United States and the State of wisconsin

while acting in their capacity as an attorney. There is a quid pro quo and, thus, Heilprin's argument on this point must also fail.

3. Heilprin claims that the term "offensive personality" is so vague as to fail to put him, or any other attorney on notice as to what kind of conduct he is prohibited in engaging in. He indicates that, as used in this grievance, its vagueness approaches and exceeds the Point where it becomes unconstitutional. It is the Respondent's burden of proof to show the unconstitutionality of a statutory provision beyond any reasonable doubt. SCR 40.15, the Attorney's Oath, says in part "I will abstain from all offensive personality. . ." SCR 20.04 (1984) states in part "A lawyer shall not: (1) violate a disciplinary rule or the attorney's

oath." SCR 20:4.4, states in part "It is professional misconduct for a lawyer to: (g) violate the attorney's oath." The language concerning "offensive personality" has been part of the oath since Chapter 179 laws of 1909. In State v. Eisenberg. 48 Wis.2d, 364, 180 N.W.2d, 529 (1970), both attorney Allen Eisenberg and attorney Sidney Eisenberg were disciplined by the Supreme Court for violating the oath which was then at sec. 256.29 Wis. Stats. The Court dismissed all challenges raised by the Eisenbergs to the oath, including challenges based upon Article 1, Sections 1, 13 and 22 of the Wisconsin Constitution, and the Fourteenth Amendment to the United states Constitution, for vagueness and overbreadth, as well as the First Amendment. The Supreme Court has also disciplined attorneys in other cases for

violating the oath. State v. Ledvina 71 Wis.2d, 195, 237 N.W.2d, 683.

The complained about conduct in this case concerns itself with allegedly inappropriate comments of a sexual nature made to two of Heilprin's clients. In 1973, Heilprin was disciplined by the Supreme Court for two similar incidences in which he made obscene remarks, proposed sexual intercourse and made other indecent sexual proposals. Heilprin, of all attorneys, should be perfectly aware as to whether the conduct complained of in this grievance proceeding is offensive or not. Additionally, as aptly pointed out by counsel for the Board, neither of the two words in this phrase is at all ambiguous and both words are in common usage by the public in general and attorneys in particular. The proscription is broad, but

not overly so, much like the criminal prohibition against "disorderly conduct." That part of Section 947.01, referring to "otherwise disorderly conduct", has been challenged on constitutional grounds as being overly broad and the Courts of the State of Wisconsin have concluded that the prohibition is constitutional.

Heilprin has failed to bear his burden of proof, and this challenge must fail as well.

4. Heilprin has also alleged that the Board has impermissibly failed to follow its own Procedural rules, but he fails to specifically allege which of the rules contained in Chapters 21 and 22 of Supreme Court Rules have been violated. Recommendations made by Board staff, the Board Administrator, District Disciplinary Committees, and attorney investigators are

advisory. The Supreme Court has previously ruled that due process does not obtain until a formal complaint is filed. Until that time, the respondent attorney is entitled to "fairness". Even the Report and Recommendation of a Referee is advisory to the Supreme Court. It is the Supreme Court of the State of Wisconsin that determines if a violation has occurred and, if so, what the appropriate sanction is.

The various investigative arms of the Board are not required to completely examine a grievant's background, permit the respondent attorney to ask questions, ask specific questions suggested by the respondent attorney, keep specifically detailed notes, interview all available witnesses, or always have a hearing with live testimony. For example, in the Rothstein matter, the committee had a court

transcript available. What Heilprin apparently feels he is entitled to is a full-blown hearing at every level of investigation, including the right to testify, call witnesses, cross-examine witnesses, call expert witnesses, and determine what evidence the investigative body be allowed to examine, as well as determine what kinds of evidence the investigative body not be allowed to examine.

Despite Heilprin's assertion to the contrary, it appears that an appropriate quorum was present when the committees voted on the Tate, McSherry and Rothstein matters. Heilprin has had ample opportunity to present his side of these matters up until the time that the complaint was filed. In light of Heilprin's position, vis a vis his demand

for a jury trial and his inquiry as to whether or not he could file a counterclaim as part of this grievance procedure, his credibility as to his assertion that he has been somehow prejudiced by the Board failing to file its own rules is questionable. It appears more likely that Heilprin wants the Board to simply leave him alone to practice law and to act as he chooses and, failing to convince the Board of that position, then he Wants to have the entirety of the investigative process turned into an adversary proceeding.

Heilprin received ample opportunity to respond to the Board's concern in these three investigations and I find no merit to any of his Motions to Dismiss. The Supreme Court stated in State v. Hersch, 73 Wis.2d, 390, 243 N.W.2d, 178 (1976): "We held that an attorney's constitution of

due process right involved only his right to prior notice of charges, his right to prepare to defend these charges and his right to a full hearing on these charges." These rights obtain upon the filing of a formal complaint before the Supreme Court of the State of Wisconsin.

FINDINGS OF FACT

CREDIBILITY

As to the Tate and McSherry Complaints, the relative credibility of the two complainants and Attorney Heilprin are at issue.

There were several rather common means available to test the credibility of the three. For example:

1. Was it more likely that Heilprin made the statements that he is accused of because he had been accused of and found

guilty of similar violations of Supreme Court Rules in the past?

2. Was it more likely that Heilprin made the statements that he was accused of because there were two witnesses with similar complaints?

3. Because Tate also made extremely disparaging complaints about her husband, Reverend Lenentine, Attorney William Wenzel, and Attorney Winston Binstock, was it probable that she was simply taking out her anger as to these four on Heilprin, especially in light of the fact that at their third meeting Heilprin apparently for the first time told her that her daughter had a potential cause of action against her for her personal injuries arising out of the accident with Reverend Lenentine's son, and that he would have a conflict of interest in representing both of them?

4. Was it probable that in light of McSherry's lack of formal education and intelligence she was likely to be influenced to file a complaint against Heilprin because she was contacted by telephone by Tate?

All four of the foregoing potential tools for assessing credibility were rejected for being too simplistic and, therefore, probably wrong.

Using the normal tool of a trial judge or trial attorney in assessing credibility based upon demeanor at trial was also of questionable value. Tate was an extremely hostile, angry, and argumentative witness. As a practicing attorney, the undersigned is always wary of clients who appear to be unusually hostile, and especially of clients who come into the office bitterly complaining about other attorneys, as did

Tate. On the other hand, Heilprin also exhibited anger and hostility during the hearing, whether he was acting in the capacity of an attorney or a witness. On the surface, Heilprin's demeanor in testifying was that of a person testifying to the truth. He looked directly at the undersigned, he seemed relaxed, and he maintained good eye contact. However, during the course of his own testimony, he gave a virtual seminar on what body language to utilize in assessing the credibility of a witness and, therefore, because of his obvious expertise, his own body language could not be used as a barometer of credibility.

In the case of McSherry, one of the normal tools in assessing credibility - that of examining the clearness or lack of clearness of recollections - was not

particularly valuable simply because she was admittedly intellectually impaired and under educated. Her testimony style was interesting; she appeared to be totally guileless, very simplistic and very straight forward. She did not over commit with her answers. She did not exaggerate and she did not seem to have any interest whatsoever in making herself look good. She simply answered questions as best she could, admitting that her memory of dates was poor.

One wonders why any woman would return not once, but twice, to an attorney who allegedly made sexually inappropriate and offensive comments. In Tate's case, she indicated that she felt uncomfortable at the time, but that she trusted "God, ministers and lawyers". McSherry indicated that she simply looked away from Heilprin

when he delved into subject matter that made her feel uncomfortable. She acted similarly at the hearing.

Was McSherry's credibility damaged because she admittedly made no mention to anyone other than Heilprin that the very individual who ran into her while she was a pedestrian subsequently later sexually assaulted her? There are. however, many reasons why a person would not report a sexual assault, including fear of the person who did it, fear of the authorities, embarrassment, which Mcsherry indicated was the case in her instance, or ignorance as to what to do or whom to go to. Thus, her failure to discuss the sexual assault with anyone other than Heilprin did not imply that she was a liar.

One has a difficult time understanding why any woman would allow herself to be

subjected to the sexual questions and comments allegedly made by Heilprin to both McSherry and Tate without getting up and walking out. But, it is equally difficult to understand why any attorney would continue to engage in a private conversation with a woman client who made inappropriate and offensive sexual comments as Heilprin claims that McSherry did.

Because all of the foregoing tools in assessing credibility raised more questions than answers and, thus, were inconclusive, other indicia in assessing credibility were used.

The undersigned has had this case for approximately one year and, during that year, has had more extensive contact with this particular respondent than in any other disciplinary proceeding in the last four Years. There were numerous hearings

both in person and by conference call. The undersigned was the recipient of a seemingly never ending series of motions and correspondence from and between counsel. During the course of this proceeding, Heilprin has shown himself to be extremely suspicious and paranoid; at the fact finding hearing, on several occasions, he indicated that he had been "framed" and he indicated that there was a "conspiracy" to get him. During the course of these proceedings he has:

1. Made absolutely meritless motions;

2. He has prolonged and protracted these proceedings by drastically over stating the amount of time necessary to prepare;

3. He has made extravagant claims as to the amount of discovery that he intended to do;

4. He has overstated the amount of hearing time that would be necessary;

5. He named an excessive amount of potential witnesses, many of which he indicated would testify on subject matters so far removed from the merits of this case so that he must have known that their proposed testimony would have been patently irrelevant and inadmissible;

6. He has deliberately disobeyed various orders and then claimed that he was being victimized;

7. He has verbally threatened various participants with lawsuits; and

8. He has attempted to deflect this inquiry away from the merits by verbally attacking others, refusing to comply with

discovery orders, by failing to cooperate in the timing of hearings and discovery and by attempting to introduce extraneous and nonrelevant issues into the Proceedings.

At the fact finding hearing itself, he deliberately disregarded an order of the undersigned and attempted to put into the record testimony of a nature that had previously been ruled objectionable and non-admissible.

All of the foregoing actions of the respondent had a direct bearing on his credibility and, thus, Heilprin's testimony was given limited weight when it contradicted the testimony offered by the Board on the Tate and McSherry Complaints.

COUNT I - TATE COMPLAINT

Beverly Tate is a 52 Year old woman who was involved in an automobile accident

with Paul Lenentine on 1 September 1986. She had major injuries, including having her throat ripped open, lacerations to her head and leg, and her foot crushed. She spent over 15 hours in surgery and two and a half months in the hospital.

She made a telephone call appointment to see Attorney Heilprin on 15 June 1987, and she met him in his office on 17 June 1987. A great deal of Heilprin's initial interview with Tate was recorded by a reporter. After the reporter left, Heilprin proceeded to ask questions of a more personal nature, not simply on the legitimate issue of loss of consortium, but also as to whether or not she had her legs in the air when she had sexual intercourse; and whether or not she did oral sex. Subsequently, on 16 July 1987, he met with her again and asked similar questions, such

as: if she was going to have an affair, what kind of man would she have an affair with?

He further asked her how many climaxes she had and made a statement to the effect "I bet your nipples get really hard". She indicated that she did not know how either comment was related to the motor vehicle accident, but she was intimidated by Heilprin and although she felt that she did not want to see him again, she continued as his client.

On 19 April 1988, she again came in with her young daughter, Christine, and in the middle of that particular interview, Heilprin took a telephone call where he again started making sexual comments in their presence with the person on the telephone. Tate testified that she and her

daughter left until he was finished with the telephone call.

She terminated the relationship by a telephone call to Heilprin on 29 April 1988, followed by a letter of 2 May 1988, in which she indicates in part "I have been very uncomfortable in your presence because of your sexual behavior. . ."

The various statements and questions of a sexual nature made by Heilprin to Tate were not relevant to a loss of consortium claim and to the contrary simply exhibited an excessive purient interest on his part.

COUNT II - MCSHERRY COMPLAINT

Tate admitted that she called McSherry, but denied that she advised McSherry to file a grievance against Heilprin. She indicated that she simply indicated that she had heard that

McSherry had problems with Heilprin and inquired if it was true.

McSherry is a 43 Year old woman who is married, but has been separated from her husband for seven Years. She Participated in special education and went to the equivalent of third grade. On 10 September 1985, as a pedestrian, she was hit by a car. She went to several attorneys ending up with Heilprin, in fact indicating that she was "running around town" looking for an attorney.

She saw Heilprin twice between the middle of March and early April. She could not read the Complaint to the Board that she had signed. She did, however, believe that the signature was hers. Heilprin invited the undersigned to compare that signature with the signature on the Contingent Fee Agreement dated 31 March

1988. Although the undersigned is no expert in handwriting, the signatures did appear to be made by the same person.

Heilprin testified and for that matter stated in a letter dated 24 February 1989, which was entered as Respondent's Exhibit 20, that McSherry evinced a preoccupation with her pubic area, as well as her breasts. He testified that she told him she liked to pick up men at the bar and then go home and have sexual intercourse with them. He indicated that in fact she seemed quite happy to talk about her sexual exploits referring to an individual who wanted to take her to Dubuque, she allegedly volunteered: "He wants to fuck me, Dick".

Contrary to Heilprin's perception. McSherry seemed to be uncomfortable at the hearing when discussing the sexual comments

that were allegedly made. Interestingly, Heilprin did not ask her on cross-examination whether it was she rather than he, as he claimed, that made the various sexual comments. It is also interesting to note that while claiming that there was a conspiracy to engineer this grievance procedure against him, he deposed none of the persons that he claimed were engineering the grievance in the approximate year that this matter was pending.

If it was in fact McSherry who was the author of the sexual comments rather than Heilprin, Heilprin would have logically either terminated the interview or had a secretary or some other third person sit in on the interview as a witness.

Heilprin did in fact ask McSherry whether her pubic hair was the same color

as the hair on her head; he did comment that he bet that her nipples were big brown and soft and at their second appointment, he made comments to the effect that:

A. He bet she was the kind of woman who would let a man play with her clit:

B. He bet that she liked to give head; and

C. He bet that she liked to get on a man and ride him real slow and then when she came, ride real fast.

None of the questions and comments constituted a legitimate inquiry into a potential loss of consortium claim and again simply demonstrated Heilprin's purient interest into the Private life of a client.

COUNT III - ROTHSTEIN COMPLAINT

On 29 October 1986, Attorneys John Rothstein and Heilprin were engaged in a deposition of a Mr. Dalloz in Chicago. At the end of the deposition, an incident occurred which led Rothstein to insert the probability of his filing a grievance against Heilprin into the settlement negotiations on the Mann case, which occurred on 31 October 1986, and 1 November 1986. It is likely that if Attorney Rothstein had been more self confident and assertive, or if Attorney Heilprin had been less belligerent, the matter would have ended on 29 October.

Normally, transcripts of judicial proceedings are an ideal way of determining what has occurred. However, Judge Kent C. Houck himself testified that the transcript in the Mann v. International Harvester case

was suspect. He indicated that the court reporter had been replaced, that Exhibit 6 was a "poor transcript", and the court reporter had the wrong participant making statements throughout the transcript. Reviewing the transcript of the hearing made in Judge Houck's chambers on 31 October 1986, it is clear that Judge Houck was correct and, thus. it is not appropriate to give as much weight to the transcript as to the testimony of the various witnesses who were present in Judge Houck's chambers at the time.

There Was testimony by Attorneys Easton and Heilprin, as well as David Mann, that the tying together of the settlement and the grievance were mentioned by Attorney Rothstein and his partners. There was testimony from all three that Heilprin told his client, Mann, that he should make

a decision on settling the case in his own best interests and not worry about Heilprin because "I am a big boy and I can take care of myself." There was testimonY from all three that Heilprin would absence himself from any settlement discussions, leaving that up to Easton. Heilprin left in the morning to go "antiquing" and did not return until afternoon.

It is clear that Mann was loath to subject Heilprin, to whom he was extremely loyal as a client, to any grievance and he did not want to leave the grievance matter open while settling his own case. Judge Houck testified that he believed the failure to settle the case the morning of 31 October 1986, was related to money. He testified that in the afternoon session he thought that the problem was the conflict

of interest and that it was the plaintiff, Mann, who held up the settlement.

It is clear that on 31 October 1986, Heilprin was concerned about the Mann case settling without resolving the grievance against him. However, it is just as clear from the testimony of Judge Houck, Heilprin, Mann, and Easton that Heilprin, as well as Easton, advised Mann that the settlement of Mann's case should be made based upon Mann's best interests and not Heilprin's. Heilprin indicated to Judge Houck that the Judge should interview Mr. Mann and whatever Mann said he would abide by. It is also apparent that part of the discussion interposed by Heilprin had nothing to do with the grievance, but simply had to do with him wanting to preserve his attorney lien, which he had a right to do. Mann probably was reacting to

Heilprin's comments, but it was clear both from the transcript and the testimony that he was being told to make his own decision. If Judge Houck had simply informed Heilprin that he should leave or, alternatively, make no comments whatsoever, the case may have very well resolved itself on the 31st. On 1 November 1986, the case in fact did settle and it is clear that Heilprin had nothing to do with the settlement and he in no way obstructed Mann from reaching his decision to settle the case.

Judge Houck, in his letter to Nancy L. Warner at the Board dated 24 March 1987, indicated in part: "Mr. Heilprin was aware of the conflict of interest and sought to remedy the situation by having Attorney Easton take over representation of Mr. Mann. Mr. Easton actively represented Mr. Mann and advised him to settle without

regards to the grievance of Mr. Heilprin. This representation included taking a position in direct opposition to Mr. Heilprin's point of view as to what could be included in the settlement." Judge Houck further indicates that: "...I did not observe him do anything or say anything that was inconsistent with Mr. Easton being the attorney for Mr. Mann," and, further, that the only way out of the conflict would have been for Heilprin to totally withdraw and Mann obtain other counsel, which would have made an adjournment necessary. Judge Houck then concluded that: "The next best method of handling the conflict of interest was to have Mr. Easton represent Mr. Mann in the matter of the settlement. This was done and ultimately resulted in Mr. Mann settling the case without regard to the BAPR complaint."

Attorney Easton's letter to Ms. Warner dated 24 March 1987, is equally favorable indicating his belief that Rothstein PurposelY tied the settlement of the case into the charge of professional misconduct and that it was Mann who was adamant that he did not want to settle the case and require Heilprin to fend for himself. Finally, Exhibit 8, which is a transcript of a hearing in front of Judge Houck on 1 November 1986, in which he states: "Mr. Heilprin has taken no part, no way obstructed Mr. Mann in reaching his decision."

CONCLUSIONS OF LAW

1. As to Count I, Heilprin has violated SCR 40.13 of the Code of Professional Responsibility, which corresponds to SCR 40.15 under the Rules of Professional Conduct as adopted 1 January

1988, and SCR 20.04 (1) of the Code of Professional Responsibility, which corresponds to SCR 20:8.4 (g) of the Rules of Professional Conduct as adopted on 1 January 1988, by engaging in offensive personality in violation of the Attorneys Oath in his comments and questions to Mrs Tate.

2. As to Count II, Heilprin has violated SCR 40.13 of the Code of Professional Responsibility, which corresponds to SCR 40.15 under the Rules of Professional Conduct as adopted 1 January 1988, and SCR 20.04 (1) of the Code of Professional Responsibility, which corresponds to SCR 20:8.4 (g) of the Rules of Professional Conduct as adopted on 1 January 1988, by engaging in offensive personality in violation of the Attorneys

Oath as to his comments and questions to Mrs. McSherry.

3. As to Count III, involving the Mann case, the provisions of SCR 20.24 (1) of the Code of Professional Responsibility, which corresponds to SCR 20:1.7 (b) under the Rules of Professional Conduct as adopted 1 January 1988, are not applicable to the factual situation whatsoever. Nor, did Heilprin violate SCR 20.26 (1) of the Code of Professional Responsibility, which corresponds to SCR 20:1.8 (j) of the Rules of Professional Conduct as adopted 1 January 1988.

RECOMMENDATION

This is a complex case in part because Attorney Heilprin is a complex individual. During the course of the hearing, he exhibited extremes of emotion that ran the gamut from absolute outrage and anger to

exquisite joy. When he felt that he was not getting his way, he became belligerent and threatening. When a break was taken during the middle of his testimony so he could talk to his wife and he discovered that she had received a hoped for job opportunity in Washington, he wept tears of joy for her good fortune. At times he was sarcastic and bombastic and at times he was jovial, entertaining, and charming.

Attorney Heilprin is a man of extreme emotional swings, which may be a cause of some concern. In his favor, he appears to be an extremely competent, hard working and dedicated advocate to his clients. One only has to review the testimony of Mr. Mann to see the kind of client loyalty Heilprin is capable of inspiring. Unfortunately, he appears to take his advocacy to the point where he is

unnecessarily abrasive, intimidating and apparently, based upon his own testimony, not particularly popular with his peers at the Bar.

As to aggravating factors, that which is most important is that he has been previously disciplined on two occasions for similar activity as charged in the Tate and McSherry matters. Either he cannot control his proclivity to be sexually explicit and offensive with female clients, or he refuses to understand that the First Amendment to the United States Constitution is not an absolute license to say anything he wants to anyone he chooses at any time. As an attorney, acting as an attorney, he must come to understand that there are legitimate limits put on his behavior.

The Board recommends a two year suspension. Heilprin points out that, in

his opinion, his behavior, even if a violation of applicable Supreme Court Rules, which he does not concede, is not as severe as the attorney's behavior in the Bruckner case. However, what he fails to recognize is that he has been subjected to discipline on three separate occasions.

1. In State v. Heilprin, 59 wis.2d 312 (1973), his license was suspended indefinitely for among other things, obscene words and Propositions to clients;

2. In 1981, he accepted a Private reprimand for offensive personality in repeatedly asking a female divorce client explicit questions about her sexual behavior; and

3. In 1985, his license was suspended for 60 days for actions factually unrelated to the present complaints.

Thus, the Referee recommends that the supreme Court:

1. Suspend the license of the respondent, Richard A. Heilprin, for 18 months; and

2. Tax the costs of these proceedings against Richard A. Heilprin.

Dated at Rhinelander, Wisconsin this 24th day of April, 1991.

BY: _____
Timothy L. Vocke, Referee
Reserve Judge, State of Wisconsin
Post Office Box 1416
Rhinelander, Wisconsin 54501
Telephone: (715) 369-5029
Fax: (715) 369-7989

IN SUPREME COURT

Case No. 90-0503-D

In the Matter of the Disciplinary Proceedings Against:

RICHARD A. HEILPRIN,
Attorney at Law,

Appellant,

Appeal from the Report and Recommendation of the Referee

BRIEF OF APPELLANT

ATTERBURY, RILEY, LUEBKE
& PRETTO, S.C.

Michael Riley
Attorneys for Appellant

411 West Main Street
Madison, WI 53703
(608) 257-4715

ARGUMENT

I. THE PHRASE "OFFENSIVE PERSONALITY" IN THE ATTORNEY'S OATH DOES NOT PROVIDE AN APPROPRIATE BASIS FOR DISCIPLINE.

The complaints brought by the Board against Attorney Heilprin based upon the statements of Mrs. Tate and Mrs. McSherry rest entirely on that provision of the attorney's oath which reads: "I will abstain from all offensive personality." No independent violation of a specific Supreme Court rule is alleged. Rather, the Board seeks to elevate that language in the code to the status of a disciplinary standard based upon the provision in SCR 20.04 which states in pertinent part: "A lawyer shall not violate a disciplinary rule or the attorney's oath."

The Referee found that the decisions of the Supreme Court in State v. Eisenberg,

48 Wis. 2d 364, 180 N.W.2d 529 (1970) and State v. Ledvina, 71 Wis. 2d 195, 237 N.W.2d 683 (1975) authorized disciplinary proceedings based solely upon the attorney's oath. Moreover, the Referee imposed upon Attorney Heilprin the burden of proving beyond any reasonable doubt that a prosecution under the referenced language was unconstitutional. Those positions are unsupported by the laws of this state.

Imposition of discipline based solely on "offensive personality" does not comport with the language or the spirit of the decisions in this state respecting appropriate basis for attorney discipline. Those disciplinary proceedings which have made reference to violations of the attorney's oath have also cited violations of parallel rules of conduct in support of the discipline. The Board is attempting in

the present cases to impose discipline based upon the broadest possible language in the oath, language which finds no equivalent in the rules of conduct. The Court's ruling in this case will determine whether not only Attorney Heilprin, but any attorney in this State can be subject to discipline solely for violating the broad aspirational language of the oath without more.

The particular language relied upon by the Board is couched in terms that are more appropriate for setting goals than setting standards. While portions of the oath may fairly be viewed as setting forth minimal standards, that can scarcely be said of the reference to offensive personality. Affidavits were submitted from Attorneys Hildebrand and Kapp highlighting that fact.

If lawyers are to be judged and found wanting based upon offensive personality, what limits are to be set upon that judgment. Is the use of strong, if not sexually explicit, language to be a fit subject for discipline? Will the recounting of jokes which do not meet the current standards of good taste subject the teller to suspension? Many of us exhibit personal foibles that may be offensive to others, and most of us have taken offense at the speech or conduct of other lawyers on more than one occasion. In each instance where offense is given or taken, are we placed in peril of discipline? The language of the oath provides no guidance on any of these issues, and who of us would wish to be judged by this amorphous standard.

The court may be tempted by the alleged facts in this case to endorse the expansion that the Board is seeking. That cannot be done, however, except at great expense to the fundamental principal that rules which govern conduct ought to contain some reasonably ascertainable standards. The section of the oath upon which the Board relies does not meet that test and the Board ought not to be permitted to use this case as a vehicle for obtaining a broad endorsement of every fragment of the oath as a standard of conduct. This is precisely what the Board seeks and the Referee's report and recommendation would permit.

The Referee placed the burden upon Attorney Heilprin to demonstrate the unconstitutionality of a statutory provision beyond a reasonable doubt. That

burden is inappropriate in this case. The United States Court of Appeals for the Seventh Circuit has held that where a statute impinges on the exercise of First Amendment rights, the burden of establishing its constitutionality is on its proponent. Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248, (1985). Moreover, the thrust of the Wisconsin courts rulings has always been that a statute should be construed so as to avoid constitutional objections, Jankowski v. Milwaukee County, 104 Wis. 2d 431, 312 N.W.2d 45 (1981). The courts have frequently construed statutes in a manner which voids constitutional objections, rather than simply rejecting all challenge to the statutes. What the appellant seeks in the present case is not the overthrow sec. 20.04 or of the attorney's oath, but

simply the application of rational limits to the manner in which the oath is used as a basis for discipline. That approach was approved by this Court in an earlier decision, In re Cannon, 206 Wis. 2d 374, 240 N.W.2d 441 (1932), which is discussed in detail below.

The Board and Referee have relied upon the decisions in State v. Eisenberg, and Ledvina, supra, as supporting imposition of discipline based solely upon a violation of the attorney's oath. Not only are both cases readily distinguishable on their facts, but neither supports the proposition for which they are relied upon.

State v. Eisenberg, 48 Wis. 2d 364, 180 N.W.2d 529 (1970) involved abusive behavior so extreme that it resulted in the suicide of the judge at whom the behavior was aimed. That conduct clearly would have

fallen within the language of a specific disciplinary rule. In the Eisenberg case, the language cited is mirrored by language in the disciplinary code regarding the conduct of lawyers toward courts. The court specifically recognized that in its decision when it noted at page 379:

> We find that the above acts of the defendants constitute unprofessional conduct tending to bring the courts into disrepute and contempt and that such conduct is contrary to the duties of the defendants as licensed attorneys and in violation of their oaths as attorneys taken pursuant to sec. 256.29, Stats.

Eisenberg does not involve the concept of offensive personality, and the court did not rely solely upon the isolated language in the oath and imposing discipline. Eisenberg is not authority for the entirely different and far broader position the Board seeks to advance in the present case.

The Eisenberg decision is noteworthy for the manner in which the court met the objections of overbreadth advanced by the respondent. The court rejected the argument specifically because its earlier decision In re Cannon, 206 Wis. 2d 374, 240 N.W.2d 441 (1932) had placed an interpretation in sec. 256.29, Stats., which limited its potential scope and application in a manner clearly consistent with the mandates of the United States Constitution.

What the Eisenberg court cited with approval is precisely what we are seeking from this court. We do not seek the invalidation of a statute, but an interpretation which limits the potential scope of its application in a manner consistent with the mandates of the Constitution.

The language of the Cannon decision is instructive as to what limits are appropriate. In that case, the court clearly disapproved of Mr. Cannon's conduct, which involved criticism of the judiciary, but did not feel it appropriate to make it a subject of discipline. In taking this position, the court stated:

> The standards of propriety generally recognized by the legal profession do not justify the reckless criticism of the court's indulged in by Mr. Cannon. Here, again, however, we think the observance of these proprieties should be brought about rather by the moral influence of the Bar itself than by coercion on the part of the courts. 206 Wis. 2d at 408.

The restraint exercised by the Cannon court is in marked contrast to the sweeping actions which the Board urges upon this court. The Cannon court declined to exact punishment for criticism of the judiciary because in doing so, they would be

"entering upon a field where such a question will not always be so easy of decision." The Cannon court saw clearly the need for restraint in applying the relatively clear mandate concerning respect for the judiciary, how much greater that need in the present case where attempt to discipline is based upon the entirely nebulous concept of offensive personality.

The Ledvina case is of no greater assistance to the Board than Eisenberg. Ledvina also involves an extended course of harassing conduct, which the court noted also violated several specific disciplinary rules which were set forth in the decision. The reference to offensive personality in that case is essentially an afterthought. The court had already detailed a number of violations of specific disciplinary rules and then noted in passing that many of the

incidents also violated provisions of the attorney's oath concerning offensive personality. It does not appear that the court relied upon the offensive personality language in imposing discipline, and it is certainly clear that the Board did not seek to impose discipline based solely upon that language as it does in the case now before the court.

In the course of hearings on motions before the Referee and the Board suggested that whatever the shortcomings of offensive personality as a standard, it should be found to extend to at least to Attorney Heilprin's conduct. The hazards of endorsing prosecutions based solely upon that amorphous term is obvious. Whatever the view of the present conduct, ratification of the Board's approach will inevitably lead to its use in other

situations. That will place every attorney in the State at risk of discipline for something which is utterly lacking in the ascertainable standards, referenced to by the court in State v. Schalow, 131 Wis.2d 1, 388 N.W.2d 176 (1986).

Moreover, Wisconsin had refused to countenance the notion that a flawed standard may be acceptable where applied to conduct which may be a proper subject for government regulation by a more narrowly drawn law. At page 499 of In The Matter Of The Complaint Against Seraphim, 97 Wis. 2d 485, 294 N.W.2d 485 (1980), the court specifically rejected that notion. In doing so, the court stated:

> A statute or rule is over broad when its language given its normal meaning is so broad that its sanctions may apply to conduct which the State is not entitled to regulate. State v. Tronca, 84 Wis. 2d 68, 89, 267 N.W.2d 216 (1978). An over broad

> statute or rule is void even though the conduct to which it is presently being applied is not constitutionally protected and would be a proper subject for government regulation or prohibition by a more narrowly drawn law. Milwaukee v. Wilson, 96 Wis. 2d 11, 19, 291 N.W.2d 452 (1980).

The cited language invalidates a disciplinary proceeding based upon the offensive personality language of the oath. By any reasonable standard, that language provides no ascertainable standard to conform to and intrudes upon areas where the State has no right or need to go.

Ultimately, the disciplinary system must stand the test of fundamental fairness. There are ample tools at the system's disposal to accomplish its ends within those bounds. The ultimate effect of a disciplinary proceeding is often to deprive a person of his livelihood, his profession and even his reputation. The

vast majority of criminal prosecutions do no more, and many do considerably less.

It is incumbent upon the system as part of our broader system of justice to maintain those standards of fundamental fairness upon which we all rely for our protection. An erosion of those standards in proceedings authored by the arbiters of fairness in our system undermines the very foundation of that system.

STATE OF WISCONSIN IN SUPREME COURT

In the Matter of the Disciplinary Proceedings Against:

COMPLAINT
Case No.

RICHARD A. HEILPRIN
Attorney at Law

TO: THE HONORABLE JUSTICES OF
THE WISCONSIN SUPREME COURT

The Complaint of the Board of Attorneys Professional Responsibility of the State of Wisconsin respectfully alleges:

1. That the Board of Attorneys Professional Responsibility is a body established by the Wisconsin Supreme Court and operates under Chapter 21 of the Wisconsin Supreme Court Rules.

2. That the respondent, Richard Heilprin, is an attorney duly licensed to practice law in the courts of the State of

Wisconsin and, upon information and belief, resides at 6001 N. Highlands Avenue, Madison, WI 53705, and currently has offices located at 315 S. Henry, Madison, WI 53701.

FIRST CAUSE OF ACTION

3. For the first cause of action, the Board of Attorneys Professional Responsibility, upon information and belief, alleges that the respondent engaged in offensive personality contrary to the Attorney's Oath, SCR 40.13[2] and 40.15 and 20.04(1)[3] and 20:8.4(g). The respondent in the course of the representation of Beverly Tate from June 15, 1987, to May 1, 1988, conducted several interviews with Beverly Tate at respondent's law offices at 315 S.

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[2]40.15 (9/1/88).

[3]20:8.4(g) (1988).

Henry, Madison, WI 53701. Respondent was representing Beverly Tate with regard to a September, 1986, automobile accident in which Ms. Tate was injured. In his first telephone call with her, respondent asked her how her sex life was. His first interview with Ms. Tate was on June 17, 1987. Respondent asked her how her sex life was. He also asked her what positions she used in sexual relations and how many climaxes she attained. He stated that he bet her nipples got really hard during sex.

4. During subsequent interviews with Ms. Tate between June, 1987, and May 1, 1988, respondent asked the same or similar questions. In addition the respondent asked Ms. Tate why she was hanging around with her husband Stan. He stated that she was an attractive lady and could do better.

5. During other interviews with the respondent, he repeated many of the above questions and in addition asked Ms. Tate if she was going to have an affair, who would she have an affair with.

6. That all of the foregoing conduct of the respondent between June, 1987, and May 1, 1988, with regard to Beverly Tate constitutes a violation of the Attorney's Oath in that it is offensive personality contrary to SCR 40.13[4], 40.15, 20.04(1)[5] and 20:8.4(g).

SECOND CAUSE OF ACTION

7. Petitioner realleges and incorporates paragraphs one through six above and adds that between March 15, 1988 and April 4, 1988, at his law offices at 315 S. Henry, Madison, Wisconsin 53701,

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[4]40.15 (9/1/88).

[5]20:8.4(g) (1988).

respondent did engage in offensive personality contrary to the Attorney's Oath, SCR 40.13[6] and 20.8.4(g)[7].

8. Ruth McSherry, an adult female who resides in Dane County, Wisconsin, was referred to respondent by another attorney for handling her personal injury matter. When Ms. McSherry met with Attorney Heilprin at his law offices in March, 1988, he questioned her about both a Worker's Compensation lawsuit and the Personal Injury matter. Respondent asked her whether her hair down below was the same color as the hair on her head. Respondent commented that he bet her nipples were big, brown and soft. When he asked her if she was married and asked her what she found attractive in her two previous lawyers. He

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[6]40.15 (9/1/88).

[7]40.16 (9/1/88).

then asked her if she found him (respondent) attractive. She responded that she did not find him attractive, that he was a crude person.

9. At her second appointment with respondent, which occurred after March 15, 1988, and before April 4, 1988, respondent asked her whether she was dating and commented that he bet she was the kind of woman who would let a man play with her clit. Respondent commented that he bet she liked to give head. Respondent further commented that he bet she liked to get on a man and ride him real hard. Respondent further commented that he believed Ms. McSherry to be so vulnerable and gullible that she would invite a man home for a day and have a good time and then forget about it.

10. All of the foregoing conduct of the respondent with Ms. McSherry constitutes offensive personality in violation of the Attorney's Oath and contrary to SCR 40.13 and 20:8.4(g).

THIRD CAUSE OF ACTION

11. Petitioner realleges and incorporates paragraphs one through ten above and adds that between October 27, 1986, and November 1, 1986, respondent accepted employment when his professional judgment on behalf of his client reasonably may have been affected by his own personal interest, contrary to SCR 20.24(1)[8] and respondent did acquire a proprietary interest in the cause of action or subject matter of litigation he was conducting for a client contrary to SCR 20.26(1)[9].

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[8]20:1.7(b) (1988).

[9]20:1.8(j) (1988).

12. Respondent and Attorney David Easton represented David Mann, a plaintiff in a lawsuit against International Harvester Company (now known as Navistar). The Law Firm of Quarles & Brady, represented by Attorney John A. Rothstein, was representing Navistar. On Monday, October 27, 1986, a videotape deposition of Henry Dalloz, an employee of Navistar, took place in Chicago. At the conclusion of the seven and one-half hour deposition, respondent took possession of a file that Dalloz had brought with him. The file was Dalloz' personal file. Respondent stated that he intended to take the file with him. Attorney Rothstein indicated that while he was willing to make photocopies of all the documents in the file for respondent, respondent was not entitled to take the original file with him. Respondent

physically grabbed Mr. Dalloz' briefcase with the file and ripped the file in the process. The videotape transcript reveals the following exchange between respondent and Attorney Rothstein and the Court Reporter:

Heilprin: As far as I'm concerned in this thing--you have no right to be taking court exhibits.

Reporter: We're on the record now. We're on the record.

Rothstein: For the record, I am taking back the Navistar file. I have offered to Mr. Heilprin to make copies of whatever he wants. The actual pieces of paper, however, are Navistar's and I will not release those to Mr. Heilprin. Now, I am taking--would you please film this?

Heilprin: I'll tell you something. This stuff was to be produced for us. I can't read it if you have it in your possession. I can't read it, Counsel, unless I have it in my possession.

Rothstein: I am physically being threatened.

Heilprin: You're not being threatened. You're just a little boy.

Rothstein: I am physically being threatened by Mr. Heilprin.

Heilprin: You're not being threatened.

Rothstein: He has just taken our file by violence and I'm leaving.

Heilprin: Oh, baloney. You took it initially by violence.

Rothstein: I'm leaving

Heilprin: So leave.

13. Respondent left with Dalloz' file but subsequently called complainant at 10:00 p.m. and apologized for his behavior. He promised to return the file the following day and did so.

14. On Friday, October 31, 1986, a Motion was held before Judge Kent Houck at the Richland Center County Courthouse in Richland Center, Wisconsin. After the hearing, the parties engaged in settlement

negotiations. A disagreement arose as to whether Attorney Rothstein's firm would report Mr. Heilprin's conduct at the October 27, 1986, deposition to the Board of Attorneys Professional Responsibility. Respondent offered to settle Mr. Mann's claim for $60,000.00, provided that respondent's conduct would not be reported to the Board. Attorney Rothstein indicated that his client would settle for $20,000.00 and that respondent's suggestion about including language regarding the potential misconduct complaint was improper. No settlement was reached and Attorney Rothstein returned to Milwaukee.

15. Respondent stayed in Richland Center along with Attorney Easton and their client, David Mann, to discuss further settlement possibilities. During those discussions, it was agreed that because

respondent had a conflict of interest in advising Mr. Mann about the settlement, Easton would act as Mr. Mann's sole advisor regarding the settlement. Respondent left so that Mr. Easton and Mr. Mann could have further discussions.

16. Attorney Easton and Attorney Rothstein had further settlement discussions by phone that same day, wherein Attorney Rothstein raised his offer to $25,000.00. The plaintiff Mann told Attorney Easton he was willing to accept the $25,000.00 offer but he wanted protection for respondent from a complaint to the Board of Attorneys Professional Responsibility. At this point, the only issue impeding settlement therefor was the professional misconduct charges. Attorney Easton explained the problem to Judge Houck and Judge Houck suggested that in lieu of

any agreement to not file a grievance against Attorney Heilprin, a two week "cooling off" period be imposed, wherein no complaints would be filed, followed by another two week period wherein Mr. Mann's case would be held open and Motions regarding any charges of misconduct would be entertained by the Court. Attorney Easton proposed this alternative to plaintiff Mann and Mann agreed that he would be willing to settle on these terms.

17. Attorney Easton then phoned Attorney Rothstein in the presence of Judge Houck and both sides agreed to the settlement. Judge Houck summoned a Court reporter so that the terms of the settlement could be recorded.

18. Respondent then returned and was advised of the settlement terms. Respondent openly disagreed with the

settlement terms arguing that he had an enforceable attorney's lien and that he refused to be "left hanging out to dry" by the terms of the settlement. Judge Houck responded that respondent should not be interfering with the settlement negotiations. When Attorney Rothstein reiterated that the settlement would have no bearing on any complaint with The Board of Attorneys Professional Responsibility, respondent insisted "I can't do that. Absolutely improper." When Attorney Easton and the Court agreed that the Court itself was willing to hear the misconduct allegations but pointed out that that would not prevent Attorney Rothstein from filing a separate complaint with the Board, respondent stated, "This is wrong Dave, I am sorry."

19. Respondent and Attorney Easton had a private conference outside of the Judge's chambers and when they returned, Judge Houck asked respondent if he was going to upset the settlement because it did not give him proper protection. Respondent replied:

> "I think the client ought to be asked the question: Are you willing to settle and have your attorney then over at the State Bar because it is obvious that where you didn't set a time limit or a limitation in this thing, that's exactly what is going to happen, and I think that's the fair question to ask Mr. Mann and whatever he says, I will abide by."

20. Judge Houck then questioned plaintiff Mann on the record. Plaintiff Mann indicated that he was not willing to settle without protection for respondent and understood therefore that he did not have a settlement and would have to go to trial. When Attorney Easton and respondent

were advised of Mann's response to Judge Houck, Attorney Easton asked to withdraw from Mann's representation. They then went off the record without settlement being concluded.

21. Judge Houck refused to allow Attorney Easton to withdraw. Attorney Easton said he subsequently met with plaintiff Mann and respondent for another two hours. Attorney Easton indicates that while respondent was still upset, he did advise Mann that there was nothing that could be done to prevent Attorney Rothstein from filing charges of misconduct and that if a $25,000.00 settlement was acceptable, Mann should agree to settle the case.

22. A settlement agreement was concluded the following day with no provision that prevented Attorney Rothstein from filing a grievance against respondent.

The court did adopt Judge Houck's suggestion that no action be taken on the complaints of misconduct for two weeks and that, if anyone did have a complaint regarding misconduct thereafter, the matter would be entertained by the Court within the two weeks following the cooling off period. Judge Houck indicated that he would not dismiss the case until the four week period had passed.

23. On November 5, 1986, respondent sent a letter of apology to Henry Dalloz for his conduct at the October 27, 1986, deposition.

24. On December 5, 1986, respondent filed a Motion for Declaratory Judgment with the trial court asking the Court to enter a Declaratory Judgment finding that respondent's conduct was "not violative of the code of professional ethics and does

not merit a formal complaint to the Board of Attorneys Professional Responsibility."

25. On February 18, 1987, Judge Houck issued a Memorandum Decision denying respondent's Motion for Declaratory Judgment on the grounds that respondent failed to start a separate action, failed to serve pleadings and failed to join the necessary party, the Board of Attorneys Professional Responsibility.

26. On December 22, 1986, the Board of Attorneys professional Responsibility received a complaint from Attorney Rothstein.

27. All of the foregoing Third Cause of Act[on constitute a violation of SCR 20.24(1)[10] and 20.26[11].

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[10]20:1.7(b) (1988).

[11]20:1.8(j) (1988).

WHEREFORE, the Board of Attorneys Professional Responsibility prays that the respondent, Richard Heilprin, be ordered to make answer to the Complaint, and if upon the trial of the issues herein, he be found guilty of matters herein charged, that he be properly disciplined therefore by Judgment of the Court and ordered to pay the costs of this action and such other orders as are just and reasonable under the circumstances.

Dated at South Milwaukee, Wisconsin, this _____ day of February, 1990.

BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY

By: _____
Kitty K. Brennan, Counsel

P. O. ADDRESS:
1334 Milwaukee Avenue
P. O. Box 308
South Milwaukee, Wl 53172
(414) 764-4410

STATE

v.

HEILPRIN

No. State 94. August Term, 1972

SUPREME COURT OF WISCONSIN

Argued May 2, 1973.--Decided June 18, 1973.

Reported in 59 Wis. 2d 312,

and

207 N.W.2d 878

ORIGINAL ACTION upon the complaint of the Board of State Bar Commissioners, seeking the discipline of defendant, Richard A. Heilprin, an attorney. Adjudged, defendant's conduct merits discipline. Discipline imposed.

The complaint of the Board of State Bar Commissioners alleged that defendant was guilty of unprofessional conduct. The Hon. JOHN A. FIORENZA was appointed referee

to hear the testimony and make findings and recommendations in conformity with the provisions of sec. 256.28, Stats. The findings and recommendations of the referee have been made and filed.

The referee found that the facts alleged in the complaint were admitted or proved with several exceptions and recommended that:

1. Richard A. Heilprin's license to practice law be suspended for an indefinite period of time pending his recovery from his medical disability;

2. Defendant be allowed to petition this court for reinstatement of his license at such time as he believes that the medical disability has been removed;

3. Upon petition for reinstatement, this court "should appoint an independent

psychiatrist to evaluate the defendant's condition."

Additional facts will be referred to in the opinion.

For the plaintiff there was a brief and oral argument by James A. Drill of New Richmond.

For the defendant there was a brief by Curtis M. Kirkhuff and Johnson, Bieber & Kirkhuff, all of Madison, and oral argument by Curtis M. Kirkhuff.

PER CURIAM. Richard Heilprin is thirty-nine years of age, a resident of Madison, Wisconsin, and has practiced law in this state for thirteen years. He is married and has two children.

The complaint in this proceeding alleges as follows:

1. On November 6, 1970, he "conducted himself in a rude, discourteous,

offensive, and unprofessional manner in conversations with Julia Hunt of the office of the Dane County Clerk of Courts," at which time he called Mrs. Hunt "stupid, irresponsible and derelict in her duty" and threatened to have her removed from her job and thrown in jail for improperly disbursing funds;

2. On November 13, 1970, and on numerous prior occasions, he similarly conducted himself with Julia Hunt and several other members of the office staff of the Dane County Clerk of Courts, creating a disturbance at which he was loud and abusive, characterized all the clerks as incompetent and accused them of dishonesty, stupidity, dereliction of duty, and favoritism toward certain attorneys;

3. From August 3 through August 11, 1970, he made abusive telephone calls to

Mr. and Mrs. Ivan Kalin in an attempt to coerce settlement of a claim against their son, at which time he threatened an expensive lawsuit he knew to be without merit, threatened to kick Mr. Kalin's "ass from wall to wall" and told Mr. Kalin that he (Heilprin) was a "killer" as Kalin would soon find out;

4. On September 23 and 25, 1969, he made abusive telephone calls to the wives of the principals of the Madison business firm of Hoff & Lem, Inc., and to that firm's secretary to whom he said such things as "If you don't tell me your name, I'll call the police and they'll come up and get your name," "You go in there and kick that goddamn door down," "Get that son of a bitch on the telephone," and "You get that jackass," and obtained a $550 check

from Mr. Hoff upon the false assertion that Mr. Lem wanted to settle a claim.

5. During January or February of 1970, he made sexual advances to N_____ S_____, a client, at her initial visit, at which time he talked obscenely, indecently exposed himself, touched N_____ S_____ in her chest and pelvic areas, and proposed sexual intercourse; he repeated all but the indecent exposure on the client's second visit;

6. During August or September of 1970, he made sexual advances to D_____ M_____, a client, at her initial visit, at which time he talked obscenely and made indecent gestures; he repeated this conduct at her second visit and also indecently exposed himself; and in subsequent telephone conversations he talked obscenely and made indecent sexual proposals;

7. On October 6, 1970, he commenced an action on behalf of a client against Erdman & Associates, Inc., in the course of which he made a settlement demand of more than twice the amount in dispute; threatened to "queer federal financing by filing a lien" on the project involved in the action; threatened to collect 10% from the IRS for reporting that Erdman's pension trust was nonexempt; accused Erdman of "inside dealing with Madison Bank & Trust;" accused Erdman of "committing a fraud on the federal government;" threatened to "put Erdman out of business," stating that he knew where to draw the line with respect to abuse of process, and threatened that if Erdman representatives did not agree to a 45 minute delay in taking depositions, his "first stop would be at the IRS for ten percent."

Either by answer or stipulation, Heilprin admitted all allegations in the complaint except that he knew the threatened lawsuit against Mr. Kalin to be without merit, he obtained a $550 check from Mr. Hoff upon a false representation, and that he made sexual advances or exposed himself to N_____ S_____ and D_____ M_____ on more than one occasion. Heilprin then set up the affirmative defense that he was inflicted with a personality disorder for which he sought medical treatment and which was a major contributing factor in causing his problems. At a hearing on August 9, 1972, over objection by the defense, the state produced witnesses to testify as to the allegations of the complaint which were already admitted.

Mr. Ivan Kalin testified that in August of 1970, he came home and found his wife in tears. She told him that an attorney called with regard to their twenty-three-year-old son. The next day, Heilprin called Kalin at work, interrupting a business conference and stated he was representing a client who had a claim against Kalin's son which arose out of an automobile accident. The reason he called was that he understood Kalin had control over some money that belonged to Kalin's son. Heilprin stated he would settle for $3,000 if Kalin came over and made a settlement promptly. When Mr. Kalin stated he had nothing to do with his son's business, Heilprin told him he would settle for $3,000 or make Kalin sorry about it. Heilprin then added, "I just want you to know I'm a killer, and I can make it pretty

tough for you." He further stated that if Kalin were in his office he would "kick his ass from wall to wall" and show what a killer he was.

Mrs. Julia Hunt, the Deputy Clerk of Courts for Dane County, testified that Heilprin often called the clerks stupid and incompetent if they could not take care of his business at the moment, and called her a "goddamn son of a bitch." He acted this way in more than 10 telephone conversations she had with him. On one particular occasion, Heilprin represented a certain client in two successive divorce actions, but failed to file a temporary order which would advise the clerks of the second action. By mistake, the clerks sent money paid in by Heilprin's client to the client's first wife instead of to the second for whom the payments were intended.

When Heilprin discovered this, he kept Mrs. Hunt on the phone for over an hour, calling her stupid, incompetent and derelict in her duties. He told her he would call someone in the County Board's Personnel Department to see that she was removed from her job and would have the sheriff arrest her and put her in jail until she could produce the money that was mistakenly sent out. On another occasion, on November 13, 1970, Heilprin came into the clerk's office with a client at which time he called Mrs. Hunt incompetent and used profane language because she refused to send his client money until she received a termination notice from the department of social services. He ended the conversation by telling her it was time she kept her fingers out of the till and saw that people who were entitled to money were getting it.

Rose Richgels and Marion Mindrum, employees in the clerk of court's office, testified they received similar abuse from Heilprin. Marion Mindrum testified that on his November 13, 1970, outburst in the clerk's office, he pointed to her, stating, "And you over there are incompetent, derelict and cheat on the blind draw for the assignment of judges." In the year prior to the hearing, the clerks had no trouble with Heilprin. On April 7, 1971, he sent a letter of apology to Mrs. Hunt and all other office personnel in the clerk's office.

Also testifying at this hearing were Mrs. Helen Lem and Mrs. Patricia Hoff, the wives of the principals of Hoff & Lem, Inc. Mrs. Lem testified that Heilprin called her on the telephone on September 24 or 25, 1969, looking for her husband. When she

stated she did not know where he was, he said she did know and he would keep calling until she told him. Heilprin threatened to send out the sheriff if she did not tell him where her husband could be found. She then hung up; he called back, but she hung up as soon as she discovered who it was. After these calls, she was very upset and frightened. Mrs. Hoff testified that Heilprin called her on September 23, 1969. He talked about some check upon which Lem stopped payment, adding "And you know what kind of a person Charlie (Lem) is." Heilprin mentioned calling the district attorney and the bad publicity which would result from the stopped payment of the check. She then hung up; he called again and she again hung up. Two days later, on September 25, 1969, he called again and told her there was a woman crying in his

office because she had no food. Mrs. Hoff hung up. Heilprin called again and she again hung up. The third time she did not answer the phone but let it ring about 100 times.

On August 23, 1972, Heilprin presented his affirmative defense through expert testimony of Dr. Joseph G. Brown, a psychiatrist. Heilprin voluntarily absented himself from the hearing at this point because it was deemed harmful for him to hear the medical testimony. Dr. Brown first saw Heilprin on December 4, 1969, at which time Heilprin's chief difficulty was in the area of marital problems. Heilprin had a history of sexual problems within his marriage and, in 1964 or 1965, sought psychiatric treatment which was terminated because of a violent disagreement with the psychiatrist. After the first interview,

Dr. Brown diagnosed Heilprin's problem as being a personality disorder--that of an obsessive, compulsive personality. A personality disorder is not an illness, such as a psychosis or neurosis, but a disorder of behavior. It is a recognized medical disability for which there is a treatment. It does not come into being, as such, until the individual's personality gets him in trouble, at which time it is labelled a "disorder."

Dr. Brown's first course of treatment was marital therapy with Mr. and Mrs. Heilprin and two psychiatrists. This continued until the end of December, 1970, at which time the other psychiatrist moved out of the city. Dr. Brown attempted to continue to do so and eventually terminated this method of treatment and saw Heilprin alone.

Heilprin made very little progress from December of 1969 until the autumn of 1970. During this time, Heilprin had been very abusive toward the doctor's staff. In the autumn of 1970, Dr. Brown told Heilprin this abusive treatment had to stop. At their next session, when the subject of his abusive behavior was brought up, Heilprin broke out in a violent burst of temper, accusing Dr. Brown of being anti-Semitic. Dr. Brown responded with astonishment and assured Heilprin he harbored no such feelings. From that point on, Heilprin made steady progress. It would take a great deal more stress now to break him down than it would have one year ago. In Dr. Brown's opinion, this improvement is partially due to the threat of disciplinary proceedings by the State Bar.

On the other hand, Heilprin still has problems in the area of emotional dependence upon his wife together with the stress this causes him, and his marital difficulties still exist. He suffers from the personality disorder which will require an indefinite period of further treatment. He is still liable to respond in a very aggressive and hostile manner should he feel himself "being moved in upon." While the likelihood of sexual misconduct is not eliminated, it is greatly reduced from 1970. Dr. Brown anticipates further flare-ups, but believes their probability has greatly declined.

After Dr. Brown was excused, the state attempted to introduce evidence which would show that Heilprin had not in fact improved as the psychiatrist believed, and thus the expert opinion should be discounted.

Because the state refused to recall Dr. Brown to question him on whether his opinion would change as a result of the further evidence of outbursts, however, the referee refused to allow the rebuttal testimony into evidence. The state then made an offer of proof that subsequent to March of 1972, Heilprin had several similar outbursts of loud and abusive conduct toward a former client and former legal associate.

The state now moves this court for:

1. A review of the referee's rejection of the rebuttal evidence and consideration of such evidence in further support of the findings;

2. A confirmation of the referee's findings of fact;

3. An order that the "medical disability" is not of such a nature as to

constitute a defense to the imposition of discipline and an order imposing discipline; and

4. If the disability is deemed a defense, for an order indefinitely suspending Heilprin's license to practice law in accordance with the referee's recommendations.

Heilprin moves to set aside the referee's finding that he still suffers from the medical disability and the referee's recommendations on the ground that they are "against the great weight of the credible evidence in the record."

The state contends it was error to exclude the rebuttal evidence of more recent outbursts on the part of Heilprin because such evidence impeached Dr. Brown's testimony that the defendant's condition had improved, or if the condition did

improve, it showed that the personality disorder had no relationship to the misconduct.

We think that the evidence offered in rebuttal was lacking in probative value and, hence, properly excluded. It failed to accomplish its purpose of showing that Dr. Brown's opinion as to Heilprin's progress was unworthy of belief; the mere incidence of further outbursts would not be inconsistent with the doctor's testimony; the doctor anticipated future flare-ups. There was no claim that Heilprin was cured, and the doctor's opinion was not based on the absence of recurring outbursts.

Both parties address themselves to the question of whether the evidence in support of the referee's findings was against the great weight and clear preponderance of the evidence. However, in attorney

disciplinary proceedings, that test does not apply. The court must look to the record de novo to determine whether the facts therein warrant discipline or suspension. State v. Weber (1972), 55 Wis. 2d 548, 200 N.W. 2d 577. It is the state's burden to bring forth such facts by clear and satisfactory evidence, the middle burden of proof. State v. Stumpf (1972), 53 Wis. 2d 690, 695, 193 N.W. 2d 842. In this case, there is no real issue as to whether Heilprin committed acts of professional misconduct. He admitted the acts as outlined in the statement of facts, and thus, the state met its burden of proof.

Dr. Brown testified that the personality disorder was a major factor in and a substantial cause of Heilprin's misconduct. The state did not introduce

any evidence which would destroy the credibility of this testimony. No evidence was offered which would disprove a causal relationship between the disorder and the acts. Thus, Dr. Brown's testimony is the only evidence on the issue of whether or not the personality disorder was the proximate cause of Heilprin's misconduct and must be accepted.

A question arises as to whether a personality disorder is such a disability as would absolve the defendant of responsibility for his actions.

This court has never held a personality disorder to be a cause of medical suspension. State v. Cadden (1972), 56 Wis. 2d 320, 201 N.W. 2d 773, involved a mental illness--schizophrenia. A personality disorder, as Dr. Brown testified, is not an illness, but a

disorder of behavior. It is in effect a composite of personality traits which causes an individual difficulties in interactions with others. As Dr. Brown admitted, many of us have characteristics comprising the obsessive-compulsive personality. It is only when those characteristics get an individual into trouble that they are labelled a disorder. If this court would recognize a personality disorder as a defense to a disciplinary proceeding, every attorney who conducted himself in an obnoxious and unprofessional manner could point to his personality traits which would, by that time, be labelled a disorder because they led the individual into trouble.

Heilprin's actions were not completely out of his control in the sense that he could not understand the difference between

right and wrong or appreciate the impropriety of his conduct.

We conclude that Heilprin's personality disorder does not excuse his misconduct. Conduct of the type engaged in my Heilprin cannot be condoned, whatever the cause. The public must not be exposed to this type of action from members of the legal profession.

We are satisfied there is clear, satisfactory and convincing evidence that Richard A. Heilprin is still liable to respond in a very aggressive and hostile manner in stress situations; further flare-ups are to be expected, and while the likelihood of further sexual misconduct is reduced, it is not eliminated. The public should not be exposed to the threat of future outbursts. Therefore, is it ordered and adjudged that the license of Richard A.

Heilprin to practice law be and is hereby suspended until such time as by order of this court he is found to have recovered from his personality disorder; defendant may petition this court for reinstatement of his license to practice law at such time as he is convinced his personality disorder has been removed; if defendant does so petition this court for reinstatement, this court will appoint an independent psychiatrist to evaluate the defendant's condition.

It is further ordered that the State Bar of Wisconsin notify the courts of record of these orders by sending each copies thereof.

It is further ordered that Richard A. Heilprin notify his clients now represented by him in all matters involving the practice of law or all matters pending in

any court of this state that his license to practice law in this state is now suspended.

WI SCR 20:8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) state or imply an ability to influence improperly a government agency or official;

(e) knowingly assist a judge or judicial officer in conduct that is a

violation of applicable rules of judicial conduct or other law; or

(f) violate a statute, supreme court rule, supreme court order or supreme court decision regulating the conduct of lawyers; or

(g) violate the attorney's oath.

WI SCR 40.15 Attorney's oath. The oath or affirmation to be taken to qualify for admission to the practice of law shall be in substantially the following form:

I will support the constitution of the United States and the constitution of the state of Wisconsin;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, or any defense, except such as I believe to be honestly debatable under the law of the land;

I will employ, for the purpose of maintaining the causes confided to me, such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client and will accept no compensation in connection with my client's business except from my client or with my client's knowledge and approval;

I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice. So help me God.

Sec. 256.28, WIS. STATS; Attorneys; admission to practice (1972).

No person shall be admitted or licensed to practice law in this state, including appearing before any court, except in the following manner:

(1) ADMISSION ON LAW DIPLOMA, LIST OF LAW SCHOOLS. (a) Every person 21 years of age or over and of good moral character who is a citizen of the United States, a resident of this state and a graduate of a law school in this state which law school at the time of his graduation was approved by the American bar association, as shown by the record of the clerk of the supreme court, and who has met the requirements of sub. (1) (b) shall be admitted to practice law in this state by the supreme court and, when such court is not in session, by one of the justices thereof, by an order signed

by such justice and filed with the clerk of said court.

(b) To be admitted on the diploma privilege, every applicant must present to the clerk of the supreme court his diploma and a certificate of the law school at which he completed his formal law studies, showing the courses completed and the semester credits earned and stating that according to the official academic records of such school the applicant has satisfactorily completed at least the minimum of legal studies required for the first degree in law and the total semester hours were not less than 84; and such studies included not less than 60 semester hours of accredited study, satisfactorily completed in regular courses having as their primary and direct subject matters the study of rules and principles of

substantive and procedural law as they may arise in the courts and administrative agencies of the United States and this state in the areas generally known as: administrative law, appellate practice and procedure, commercial transactions, conflict of laws, constitutional law, contracts, corporations, creditors' rights, criminal law and procedure, damages, domestic relations, equity, evidence, future interests, insurance, jurisdiction of courts, labor law, legislation, ethics and legal responsibility of the profession, partnership, personal property, pleading and practice, public utilities, quasi-contracts, real property, taxation, torts, trade regulation, trusts, and wills and estates. There shall be included in such minimum not less than 30 semester hours covering the following subject matters:

constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibilities of the legal profession, pleading and practice, real property, torts, wills and estates. These requirements may be satisfied by combinations of the curricular courses, and the dean of each law school in Wisconsin shall file with the clerk of the supreme court upon its request a certified statement setting forth the courses taught in his law school which are accredited for a first degree in law and the percentage of the time devoted in each course to the subject matter of the areas of law required by this rule for eligibility to admission on the diploma privilege. In addition to these requirements a law school may require other courses or practical training, for which credit toward a degree may or may not

be given, as a prerequisite to its certification of eligibility for admission on the diploma privilege.

(c) The clerk of the supreme court shall compile a record of all law schools, which are approved by the American bar association, with the date of such approval and those which are not approved; and such record so compiled shall constitute an official record of the supreme court, and proof of the fact that the law schools therein stated as approved by the American bar association were so approved at the times therein stated.

(2) ADMISSION ON CERTIFICATE OF BAR COMMISSIONERS. Every person 21 years of age or over and of good moral character who is a citizen of the United States and a resident of this state and a graduate of any law school which at the time of his

graduation was approved by the American bar association shown by the record of the clerk of the supreme court, shall, upon the production of the certificate of the board of state bar commissioners, be admitted to practice law in this state by the supreme court, and when such court is not in session, by one of the justices, by an order signed by such justice and filed with the clerk of said court. A certificate shall be given by the board of state bar commissioners to every person who successfully passes an examination given by the board of state bar commissioners covering all or part of the subject matter in the areas of law listed in sub. (1) (b).

(3) ADMISSION ON PROOF OF PRACTICE ELSEWHERE. Every person 21 years of age or over and of good moral character who is a citizen of the United States and a resident

of this state and who shall have been admitted to practice law in any other state or states or territory, or the District of Columbia, may be admitted to practice law in this state by the supreme court upon motion, or, when the court is not in session, by one of the justices thereof, after filing with the clerk of the supreme court (1) his written application therefor, (2) a certificate of his admission to practice law by a court of last resort in such other state or territory or the District of Columbia and (3) satisfactory proof that he is a citizen of the United States and a resident of this state, is of good moral character, and has been engaged in actual practice in such other state or states or territory or the District of Columbia or in the courts of the United States for 5 years within the last 8 years

prior to filing his application, exclusive in each case of time spent in the armed forces. The certificate of the judge or any court of record in such other state or territory or the District of Columbia or court of the United States, before whom such applicant has practiced, under the seal of such court, may be deemed sufficient proof of such practice in such state or territory or the District of Columbia or court of the United States.

(4) SERVICE COUNTED AS PRACTICE OF LAW. Service as judge of a court of record of any state or territory or the District of Columbia or of the United States, service in any department of the United States government including service in the armed forces determined by the supreme court to be actual legal service, and teaching in any law school which is

approved by the American bar association, may be deemed to be actual practice of law for the purpose of sub. (3), and such law teaching or such legal service performed in this state as well as in such other state or states or territory or District of Columbia will be counted under the 5 and 8 years' tests provided in sub. (3).

Supreme Court, U.S.
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No. 92-329

In The

Supreme Court of the United States

October Term, 1992

RICHARD A. HEILPRIN,

Petitioner,

v.

WISCONSIN BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY,

Respondent.

Petition for a Writ of Certiorari
to the Wisconsin Supreme Court

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

JAMES E. DOYLE
Attorney General
State of Wisconsin

WARREN D. WEINSTEIN
Assistant Attorney General
State of Wisconsin
Counsel of Record

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3793

Counsel for Respondent

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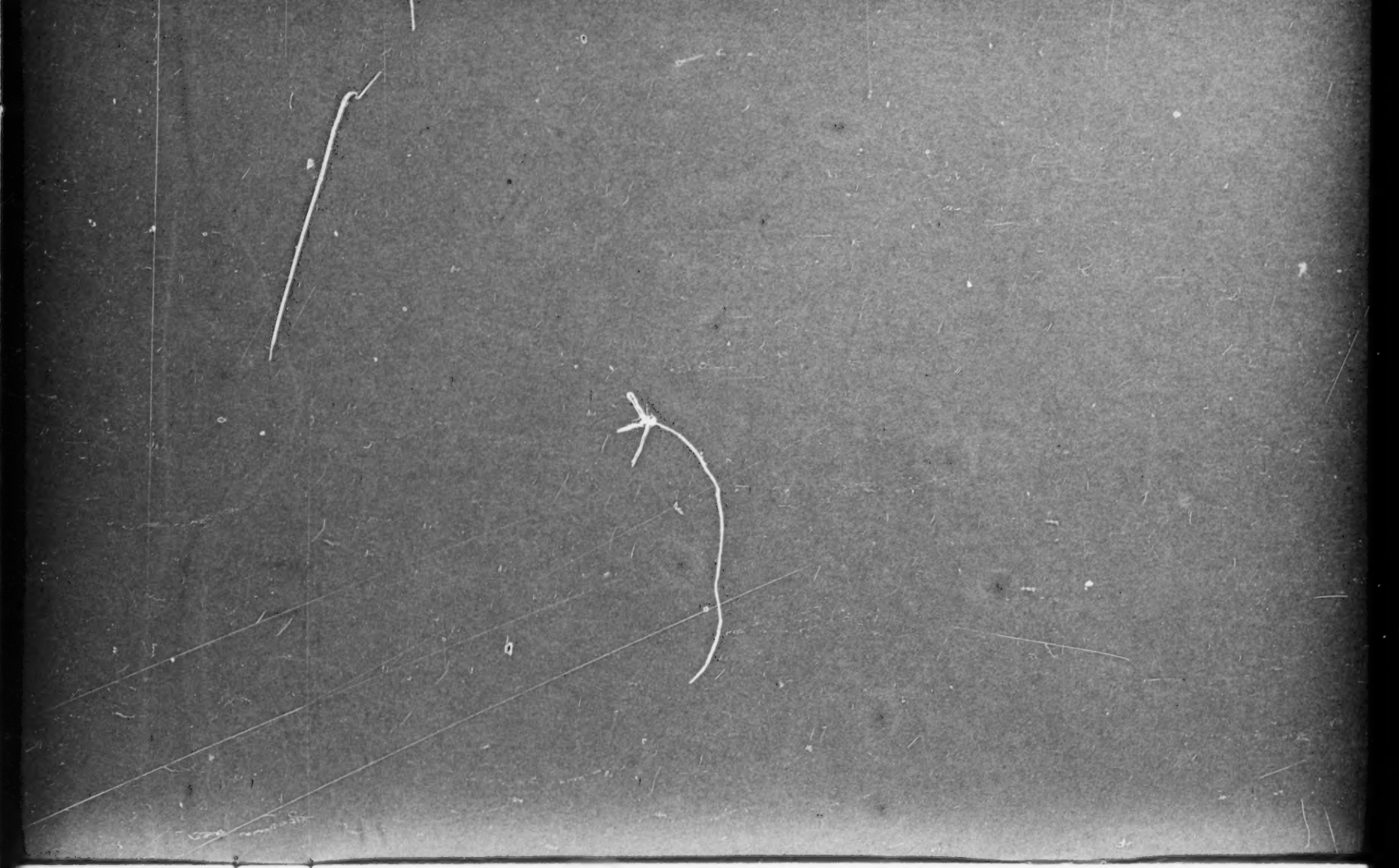

QUESTIONS PRESENTED

1. Was the revocation of petitioner's license to practice law a violation of the Due Process Clause of the Fourteenth Amendment when the complaint filed with the Wisconsin Supreme Court alleged that petitioner directed sexually explicit and suggestive comments and questions to two women clients during office conferences in the course of the attorney/client relationship, those facts were proved, but the Wisconsin Supreme Court revoked petitioner's license based on the standard of conduct enunciated in *State v. Heilprin*, 59 Wis. 2d 312, 207 N.W.2d 878 (1973), rather than the "offensive personality" standard of the attorney's oath?

2. Is the standard of conduct for which petitioner's license was revoked so vague as to be unconstitutional?

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No. 92-329

In The

Supreme Court of the United States

October Term, 1992

RICHARD A. HEILPRIN,

Petitioner,

v.

WISCONSIN BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY,

Respondent.

Petition for a Writ of Certiorari
to the Wisconsin Supreme Court

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The respondent, Wisconsin Board of Attorneys Professional Responsibility, respectfully requests this Court deny the petition for writ of certiorari requesting review of the May 5, 1992, decision and order of the Wisconsin Supreme Court, revoking the petitioner's license to practice law in Wisconsin, *Disciplinary Proceedings Against Heilprin*, 168 Wis. 2d 1, 482 N.W.2d 908 (1992), for directing sexually explicit and suggestive comments and questions to two women clients during office conferences in the course of an attorney/client relationship.

STATEMENT OF THE CASE

Respondent filed a complaint against the petitioner alleging that on two occasions with different female clients petitioner had directed sexually explicit and suggestive comments to them in office conferences during the course of the attorney/client relationship. In the case of Mrs. Tate, one of the clients, the petitioner directed sexually explicit comments to her on two occasions and made such comments in her presence on a third occasion.[1] In the case of Mrs. McSherry, the second client, on two occasions petitioner directed sexually explicit comments at Mrs. McSherry.[2] A third count also alleged that petitioner had represented a client in a conflict of interest situation. Respondent maintained that directing sexually explicit comments to female clients violated the attorney's oath which admonishes attorneys to refrain from "offensive personality." Wis. SCR 20:8.4(g) states:

> It is professional misconduct for a lawyer to:
>
> . . . .
>
> (g) violate the attorney's oath.

Respondent also maintained that the conflict of interest allegation violated Wis. SCR 20:1.7(b).

On March 12, 1990, petitioner filed his answer and a motion to dismiss. Petitioner raised a number of affirmative defenses, including that the "offensive personality" standard of the attorney's oath was vague and

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[1] The specifics of the Tate complaint are set forth in the report of the referee (P-Ap. 73-76).

[2] The particulars of the comments to Mrs. McSherry appear in the report of the referee (P-Ap. 79-80).

therefore unconstitutional. He also denied specifically that he had made the comments alleged to the two female clients.

Pursuant to Wisconsin Supreme Court rules, the Wisconsin Supreme Court appointed a referee to hear evidence and submit a report. The referee heard evidence in a two-and-one-half-day trial, decided preliminary issues including the challenge that the "offensive personality" standard of the attorney's oath was unconstitutionally vague. The referee specifically addressed in his report the issue of credibility between petitioner and the two female clients. The referee found for the petitioner on the third count.

The Wisconsin Supreme Court revoked the petitioner's license on the basis of Wis. SCR 20:8.4(f) rather than (g). Rule 20:8.4(f) provides:

> It is professional misconduct for a lawyer to:
>
> . . . .
>
> (f) violate a statute, supreme court rule, supreme court order or supreme court decision regulating the conduct of lawyers.

Petitioner had previously been disciplined, in part upon sexual comments and touching of female clients. *State v. Heilprin*, 59 Wis. 2d 312, 207 N.W.2d 878 (1973). The Wisconsin Supreme Court observed in the present case:

> We adopt the referee's findings of fact concerning Attorney Heilprin's conduct but, contrary to the referee's conclusion of law that such conduct violated the Attorney's Oath, we conclude that it violated that very standard of attorney professional conduct we

> enunciated in 1973 in a case involving this same attorney, *Disciplinary Proceedings Against Heilprin*, 59 Wis. 2d 312, 207 N.W.2d 878. There, the court suspended Attorney Heilprin's license for . . . his having talked obscenely, made indecent gestures, indecently exposed himself and made indecent sexual proposals to two women clients.

Disciplinary Proceedings Against Heilprin, 168 Wis. 2d at 2, 482 N.W.2d at 908. The Wisconsin Supreme Court ordered petitioner's license to practice law in Wisconsin revoked and entered further orders concerning the payment of costs and notification of clients and courts as provided in Wis. SCR 22.26.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE WISCONSIN SUPREME COURT DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Petitioner contends that by finding his conduct of directing sexually explicit and suggestive comments and questions to two female clients to have violated Wis. SCR 20:8.4(f) rather than Wis. SCR 20:8.4(g), the Wisconsin Supreme Court violated due process as first enunciated in *In re Ruffalo*, 390 U.S. 544 (1968). In *Ruffalo*, this Court concluded that Ruffalo had been denied due process in his disciplinary proceeding because the process in that case was a trap. Ruffalo had been charged with

hiring another to solicit clients. He testified in his own behalf that he had actually hired an employee of a railroad to investigate potential cases against that railroad. The Ohio Supreme Court then disciplined Ruffalo for hiring someone to perform services in conflict with the interests of his main employer.

The Court in *Ruffalo* held that attorneys have a due process right to know the charge against them so they could adequately defend themselves. In *Ruffalo*, the attorney did not know that the hiring of an investigator to investigate claims against his main employer was alleged to have been prohibited conduct. Moreover, the conduct of hiring an investigator was not the type of conduct which would be obviously improper to a scrupulous person.

In this case, petitioner had notice of the factual allegations which the respondent claimed constituted misconduct. The Due Process Clause requires no more. Decisions in state supreme court cases bear out the statement of the Kansas Supreme Court that

> The complaint is sufficient where it sets out the facts which underlie the charges of misconduct and places the attorney on notice as to what ethical violations might arise therefrom. The complaint need not contain an explicit reference to the specific disciplinary rules which might have been violated by the attorney.

In re Farmer, 242 Kan. 296, 300, 747 P.2d 97, 100 (1987). *See also In re Wright*, 131 Vt. 473, 310 A.2d 1 (1973); *Attorney Grievance Commission v. McBurney*, 282 Md. 116, 383 A.2d 58 (1978).

In this case, the conduct that petitioner was found to have committed was the very same conduct alleged in

the complaint and for which discipline was imposed: directing sexually explicit and suggestive comments to female clients. The "charge" did not alter from the complaint to the hearing to the Wisconsin Supreme Court decision. Only the reasoning or, as characterized by the Wisconsin Supreme Court, the conclusion of law changed. The disciplinary action imposed was imposed for the conduct charged, albeit under a different theory.

Unlike *Ruffalo* there was no trap to ensnare petitioner. He was aware of the alleged factual basis for the misconduct. The respondent presented evidence that the incidents had occurred. Petitioner presented evidence that they had not occurred. The referee resolved the conflict in evidence against the petitioner. Petitioner was not disciplined based solely on evidence he presented which he thought was a defense to the alleged misconduct. He was disciplined for committing the conduct which the respondent alleged he had committed. Petitioner knew that the issue in this case was whether or not he had directed sexually explicit and suggestive comments to two of his female clients. He defended on that basis. Although the Wisconsin Supreme Court used a different "theory" than the respondent, the difference was simply not significant from a constitutional point of view.

Nor did petitioner suffer any prejudice as the result of this change in theory. In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 655 n.18 (1985), this Court differentiated *Ruffalo* because "the variance between the theory of the Office of Disciplinary Counsel and the Board of Bar Commissioners had no such prejudicial effect on appellant." No prejudicial effect is present in this case. Petitioner does not even suggest how holding that he violated a standard of conduct that had been enunciated by the Wisconsin Supreme Court in a case against him in 1973 would have caused him to present a different defense than he presented.

The definiteness and certainty required by due process is such definiteness and certainty as will enable a presumptively innocent man to prepare for trial. *Koontz v. Glossa*, 731 F.2d 365 (6th Cir. 1984). A presumptively innocent man alleged to have committed the acts which petitioner committed would have prepared exactly the same whether the initial allegation had been under Wis. SCR 20:8.4(f), violation of the standard of conduct in *State v. Heilprin*, or Wis. SCR 20:8.4(g), "offensive personality" standard of the attorney's oath.

Nor can petitioner claim he was unaware that this type of conduct could result in the loss of his license. As observed by Justices White and Marshall in *Ruffalo*, members of the bar can be "assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment." 390 U.S. at 555. All attorneys should be aware that the type of comments which petitioner was found to have made to female clients are improper for members of the bar. Certainly, petitioner, who had been previously disciplined in part for very similar conduct, should have been aware that his conduct could result in his discipline, including disbarment.

The Wisconsin Supreme Court did not violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution by revoking petitioner's license.

II. NEITHER "OFFENSIVE PERSONALITY" NOR THE STANDARD OF CONDUCT IN *STATE v. HEILPRIN* IS SO VAGUE AS TO BE UNCONSTITUTIONAL.

Petitioner contends that the language of the "attorney's oath" proscribing "offensive personality" is unconstitutionally vague. The simple answer to this contention is that the Wisconsin Supreme Court did not discipline petitioner for "offensive personality;" but, even if they had or petitioner had claimed before this Court that the standard of conduct in *State v. Heilprin* is similarly vague, it avails him nothing.

Due process does not require that a rule contain an explicit definition of every term. All that is necessary is that the rule prescribe general principles so that those subject to the rule are reasonably able to determine what conduct is appropriate. *Ex parte Secombe*, 60 U.S. (19 How.) 9, 14 (1857). As this Court observed in *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 578–79 (1973):

> [T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. "[T]he general class of offenses to which . . . [the provisions are] directed is plainly within [their] terms . . . [and they] will not be struck down as vague, even though marginal cases could be put where doubts might arise." United States v.

> Harriss, 347 U.S. 612, 618, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954).

And in *Colten v. Kentucky*, 407 U.S. 104 (1972), this Court stated:

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing [rules] both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

Id. at 110.

As pointed out by Justices White and Marshall in their concurring opinion in *Ruffalo*, the type of conduct at issue here is certainly conduct that responsible attorneys will recognize to be grounds for disbarment. What is particularly compelling in the present case is that petitioner consented in 1981 to a private reprimand for violating the standard of "offensive personality," a violation of Wis. SCR 20:8.4(g), for just the same kind of misconduct committed in this case, to wit: asking a female client explicit questions about her sexual behavior.[3]

Certainly, petitioner, having already been disciplined for the same type of conduct, should be aware that his conduct could result in discipline. This case presents the same situation as this Court faced in *Arnett v. Kennedy*, 416 U.S. 134 (1974), where the petitioner's

> contention then boils down to the assertion that although no constitutionally protected conduct of his own was the basis for his

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[3] See the report of the referee (P-Ap. 92).

> [revocation] on [the board's] version of the facts, the . . . language in question must be declared inoperative, and a set of more particularized regulations substituted for it, because the generality of its language might result in marginal situations in which other persons seeking to engage in constitutionally protected conduct would be deterred from doing so.

Id. at 163.

This Court rejected that approach in *Arnett* and should reject it here. Since petitioner's own conduct was of the type which reasonable attorneys should be aware constitute misconduct, this petitioner's revocation based on that conduct is not "vulnerable on the ground that [it] threatens the constitutionally protected conduct of others." *Colten v. Kentucky*, 407 U.S. at 111.

CONCLUSION

Petitioner's revocation based on the standard of conduct set forth by the Wisconsin Supreme Court in *State v. Heilprin* did not violate the Due Process Clause of the Fourteenth Amendment. Neither that standard nor the "offensive personality" standard of the attorney's oath is unconstitutionally vague.

Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES E. DOYLE
Attorney General
State of Wisconsin

WARREN D. WEINSTEIN
Assistant Attorney General
State of Wisconsin
Counsel of Record

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3793

Counsel for Respondent

BR\HEILP4RS